TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 640

FLORENCE J. BAILEY, AS ADMINISTRATRIX OF OF E. BAILEY, PETITIONER,

vs.

CENTRAL VERMONT RAILWAY, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF VERMONT

PETITION FOR CERTIORARI FILED JANUARY 9, 1943.

CERTIORARI GRANTED MARCH 8, 1943.

[fol. 1]

IN SUPREME COURT OF VERMONT, WASHINGTON COUNTY, MAY TERM, 1942

No. 1692

FLORENCE J. BAILEY, Admx. Bernard E. Bailey Estate,

v.

CENTRAL VERMONT RAILWAY, INC.

Present: Moulton, C. J., Sherburne, Buttles, Sturtevant and Affords, JJ.

OPINION

SHERBURNE, J.:

This action is brought under the Federal Employers' Liability Act to recover damages for the death of Bernard E. Bailey resulting from attempting to open one of the hoppers of a coal car loaded with cinders at a dry bridge over a farm crossing about a mile and a half south of defendant's Williston station. The declaration alleges failure to provide a safe place to work, failure to furnish proper tools and appliances with which to open the hopper, failure to caution and warn Bailey of the dangers incident to the operation of opening the hopper, and failure to allow him sufficient time in which to perform the operation. Among other things the defendant pleaded the general denial and assumption of risk. At the close of all the evidence the defendant moved for a directed verdict on the ground, among other things, of failure to prove negligence on the part of the defendant and saved exceptions to the action of the court in overruling its motion.

Viewing the evidence in the light most favorable to the plaintiff, the following facts were fairly and reasonably within its tendency: Bailey, a capable and efficient workman, was about 25 years of age at the time of the injuries resulting in his death and had been a member of defendant's section crew at Montpelier Junction for about five years. A few days before the accident, Bailey's section foreman instructed him to go on what is known as a work train, and [fol. 2] on the morning of the accident he and one other member of his section went on this train to Williston, and

were joined by the crews of the Bolton, Richmond and Williston sections. The train consisted of an engine, van, several cars containing track material, a derrick, and a hopper car of cinders. During the day they were engaged in unloading track material. In the later afternoon the hopper car was spotted on the dry bridge in such a position that it would dump the cinders through the railroad ties directly onto the roadway below the bridge. This bridge was about 18 feet above the ground beneath it, and the ends of the railroad ties upon it extended about 12 inches beyond the outside of the car. Across these ties was fastened a stringer or guard rail 8 or 9 inches wide which was set in 3 or 4 inches from the ends of the ties. The hoppers of this kind of a car are closed by a chain, which winds up on a shaft running crossways of the car, with a squared end formed like a nut to which a wrench is applied. There is a ratchet on the shaft and a dog on the side of the car which engages in the ratchet and holds the shaft tight when the hopper has been closed. To unload the car a wrench is applied to the nut at the end of the shaft and the man operating the wrench pulls its handle back towards him in order that the dog may be released from the ratchet. When the tension has thus been taken off, another man standing on the opposite side of the mechanism releases the dog either with his fingers, or if it sticks, with a hammer. As soon as the dog is disengaged the man who does that steps back and the man holding the wrench pushes back on it to open the hopper. When the hopper starts to open the wrench must be disengaged or let go of or the operator may be thrown off balance. The wrench furnished for opening hoppers was what is known as a frog wrench. It was a one piece, [fol. 3] straight, heavy iron wrench with jaws open at the end and with a handle about three feet long. This kind of a wrench had been used for many years by defendant's employees for this purpose and no one had ever been injured in its operation. No one had ever seen Bailey open a hopper. Such an operation was usually performed by the older men in point of service. Bailey had been present on a very few occasions when hoppers were opened, and on previous such occasions was usually on top of the car shoveling down the cinders so as to compietely empty the hopper. Other than what was said to him just before the accident he had never been instructed in the use of the wrench for this purpose. Cinders had been dumped at this bridge each year for a

number of years to replace cinders carried away from the roadway underneath by high water. Although Bailey had worked upon a work train a number of times there was no evidence of his familiarity with the dumping of cinders at this bridge. After the car had been spotted at the bridge one Muir of the Williston section brought a shovel and frog wrench from a section motor car, and when he was about 60 feet from the bridge Bailey said to him "I can take the wrench, you can take the shovel and go up in the car," and Muir gave him the wrench. After the wrench had been handed to Bailey, Muir heard some one say "We had got just five minutes to unload the car", but he did not observe any hurry in unloading. After taking the wrench Bailey went out on the stringer on the bridge, and standing beside the car put the wrench on the nut of the car pocket and pulled the handle of the wrench towards him, while one Stone, foreman of the Richmond Section, went to help him and stood on the stringer opposite him and loosened the dog with a hammer, and then stepped back so that when the wrench was let go it would not hit him. When Stone stepped back and as Bailey started to open the hopper he said "Be careful the wrench doesn't catch you", and Bailey an-[fol. 4] swered "I will" or something like that. When this warning was hardly out of Stone's mouth, Bailey pushed the handle of the wrench towards Stone, but the hopper didn't open the first time, so he gave the wrench another push and that time it opened quickly, and Bailey went off the bridge and fell to the roadway below and received injuries from which he died. Stone had never seen Bailey before that day. In applying the wrench to the nut and pulling back Bailey acted properly without coaching, and Stone was of the opinion that he acted as if he knew how to operate the wrench in opening a hopper. No one directed Bailey to open the hopper. For the purpose of showing whether the defendant furnished Bailey with a tool reasonably safe and reasonably adaptable to the purpose for which it was used, the plaintiff offered, and the court received, over the defendant's objection and exception, as an exhibit, a Swaco safety hopper car wrench. This wrench has a shorter handle than a frog wrench, and the part that fits over the nut turns in a large casing. The direction that it can so turn is controlled by a ratchet. There is a slot in the casing where the operator can move a short lever with his fingers to reverse the direction. When turning up

a nut the operator need not remove the wrench with each half turn as he must with a frog wrench, but at the end of the pull on the handle pushes back while the ratchet turns freely, and then when he pulls again the nut is turned further. It is plain enough that if the operator were closing the hopper of an empty car, where the nut has to be turned around several times, it could be done much more rapidly than with a frog wrench. As to whether this type of wrench [fol. 5] is safer or better adapted to opening a hopper did not appear. One witness who had only used it to close hoppers said one of its purposes was to prevent the handle throwing when the nut on the hopper turns. Another witness who had used it to open hoppers said that his experience had been that it didn't operate too bad "if you didn't make a mistake and open the wring ratchet; if you do, you are going places." This wrench costs $20.00 whereas the frog wrench only costs $1.50. It appeared that the defendant had purchased one of these wrenches before the time of the accident, and one afterwards, for use by the maintenance department in which Bailey was employed, as an experiment to see if it was any more useful than a frog wrench, and that the engineering department after a trial was uncertain whether the extra cost was justified. No section foreman had ever complained to the engineer in charge of the maintenance department about the usefulness of the frog wrench.

We are here dealing with a Federal statute which supersedes all state laws covering the same field. Mondou v. New York, N. H. & H. R. Co., 223 U. S. 1, 56 L. ed. 327, 32 S. Ct. 169, 38 IRA(NS) 44; Robey v. Boston & Maine Railroad, 91 Vt. 386, 389, 390, —. In proceedings under the Act the rights and obligations of the parties depend upon it and applicable principles of the common law as interpreted and applied in the Federal Court. Chesapeake & O. R. Co. v. Kuhn, 284 U. S. 44, 76 L. ed. 157; Robey v. Boston & Maine Railroad, supra. The basis of recovery is negligence, without which no right of action is given under the Act. Chesapeake & O. R. Co. v. Stapleton, 279 U. S. 587, 73 L. ed. 861, 49 S. Ct. 442. The fact of accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employee to establish that the employer has been guilty of [fol. 6] negligence. New York Central R. Co. v. Ambrose,

280 U. S. 486, 74 L. ed. 562; Toledo, St. L. & W. R. Co. v. Allen, 276 U. S. 165, 72 L. ed. 513, 48 S. Ct. 215.

As to the alleged failure to furnish a safe place to work the measure of duty is reasonable care having regard to the circumstances. The defendant's duty in respect to the space on the bridge for standing to open the hopper did not make it an insurer of Bailey's safety; there was no guaranty that the place would be absolutely safe; nor was the defendant required to have the space of any particular width or protected by a railing so as to be free from danger, as no employment is free from danger. Missouri P. R. Co. v. Aeby, 275 U. S. 426, 72 L. Ed. 351; Toledo, St. L. & W. R. Co. v. Allen, 276 U. S. 165, 72 L. Ed. 513. Carriers, like other employers, have some freedom of choice in providing facilities and places for the use of their employees. Courts will not prescribe the space to be so afforded, nor leave such engineering questions to the uncertain and varying opinions of juries. Toledo, St. L. & W. R. Co. v. Allen, supra.

There was no evidence tending to show that the space on the bridge beside the cinder car was not a reasonably safe place under the circumstances in which to open the hopper. True, it was only about 12 inches wide and a misstep might cause a fall of 18 feet, but there was no claim nor evidence of accident when cinders had been previously dumped there or that on those occasions the operation was not performed on the bridge and in the same manner. It should be noted that this was an operation performed only once a year, and that the space afforded is not to be judged as though it was in everyday use for such purpose. Stone v. Missouri P. R. Co., 293 S. W. 367.

[fol. 7] The plaintiff makes the point that there was a safer way to dump the cinders under the bridge, and that the hopper could have been opened before spotting the car on the bridge and then the car could have been drawn onto the bridge. By doing it this way some of the cinders would necessarily have been deposited on the track and would have had to be shoveled onto the roadway below the bridge. As shown below, relative to a choice of tools, the defendant had a choice how it would do the work so long as the way employed was reasonably safe.

As to the alleged failure to furnish proper tools and appliances, the employer is under a duty to exercise ordinary care to supply appliances reasonably safe and suitable for

the use of the employee, but is not required to furnish the latest best and safest appliances, or to discard standard appliances upon the discovery of later improvements, provided those in use are reasonably safe and suitable. Chicago & N. W. R. Co. v. Bower, 241 U. S. 470, 60 L. Ed. 1107, 36 S. Ct. 624. A frog wrench had been used for many years to open hopper cars without accident, and there was no evidence that it was not reasonably safe and suitable for that purpose.

As to the duty to caution and warn, we accept the rule set forth in plaintiff's brief, that "it is the duty of a master to instruct and caution his servant regarding a risk of employment to which the latter is excusably ignorant. A master does not comply with his obligation to warn a servant of latent dangers by informing him generally that the employment is hazardous." Sanderson v. Boston & Maine Railroad, 91 Vt. 419, and Carleton v. Fairbanks & Co., 88 Vt. 537, 546, are cited in support of this rule, and the latter case also says that a master is under no duty to warn a servant of ordinary intelligence of dangers which are ob-[fol. 8] vious, but, in determining what dangers are obvious, the experience or lack of experience of the servant must be taken into account.

It is obvious that when the door at the bottom of a hopper is free to open the weight of the material in a loaded car will exert such pressure as to open it quickly, and that this opening will cause the supporting chain in unwinding to spin the shaft with the nut on the end. Bailey, a competent workman with five years' experience as a section hand, must have observed many hopper cars and noted their construction. Even if he had been present only a few times when a hopper was opened and on those occasions was usually on top of the car shoveling down the cinders that stuck on the sides of the hopper, he could not have failed to observe that the door opened quickly, and he must have known that that would spin the shaft. It is significant that in applying the wrench to the nut and pulling back so that the dog could be released he performed the operation correctly. His later pushing the handle of the wrench from him shows that he knew that the shaft must turn away from him to let the door open. It is inconceivable that as an experienced workman he did not know what was likely to happen when the hopper began to open. He was standing where, as he knew, he could not afford to take a wrong step or lose his balance.

But, if any warning was necessary, Stone's caution was to the point and timely. All that Bailey had to do when the hopper started to open was to let go of the wrench. Because of its open jaws it would have fallen free if he had done so.

Moreover, as to the claim that Bailey had never opened a hopper before and was inexperienced in that regard, it should be noted that so far as appears he had a free choice as to whether he would go on top of the car as he had theretofore done or use the wrench. No one shown to be [fol. 8a] present knew of his claimed inexperience and it is impossible to see under the circumstances why the section foreman present who had never seen him before that day might not reasonably assume that he knew how to open the hopper or why he was under any duty to forbid his undertaking to open it.

No failure of duty in respect to caution and warning is shown. Nor does the evidence show that insufficient time was allowed for the operation.

The plaintiff insists that she is entitled to invoke the doctrine of *res ipsa loquitur*. In view of what is said in Blaisdell v. Blake, 111 Vt. 123, 127-129, there would seem to be no room for the application of this doctrine. Here, however, for aught that appears, the accident may have been due to improper handling of the wrench. The doctrine does not apply where the accident might have been due to improper handling as well as to improper furnishing the thing causing the accident. Courtney v. New York, N. H. & H. R. R. Co., 213 F. 388. Negligence is not shown.

The motion for a directed verdict should have been granted. In our disposition of the case it is unnecessary to discuss the other exceptions.

Judgment reversed, and judgment for the defendant to recover its costs.

[fol. 9] Jeffords, J. (dissenting):

I do not agree with the holding of the majority that there was no evidence tending to show a failure to furnish Bailey with a reasonably safe place to work. In determining this question the situation should be taken as a whole. So taken, there is evidence from which the jury could reasonably find that the defendant permitted its em-

ployee who had had no previous experience in opening hoppers with firm ground for a footing to undertake this work for the first time in a dangerous place.

The evidence is undisputed that the distance from the floor of the bridge to the ground is about eighteen feet. Viewing the evidence in the light most favorable to the plaintiff they could reasonably have found that the only available footing that Bailey had was on a stringer which according to the evidence was eight or nine inches wide. Outside of the stringer the ties projected about four inches and thus could afford no adequate protection from a fall in the event that the workman lost his balance since the top of the ties was a few inches below the top of the stringer. To perform the work the only tool available, as far as the evidence discloses, was the frog wrench. I do not question but that this wrench may have been a proper tool to open hoppers in places where the cars would ordinarily be spotted but no testimony has been pointed out, and from a reading of the transcript I have found none to the effect that such a wrench had ever before been used under the circumstances here shown. It cannot be denied that it was a heavy, cumbersome tool. From the evidence it appears that there was no uniformity in the manner and result of using it to open hoppers. According to the testimony, one witness would let go of the wrench when the hopper started to open so that it would not catch and throw him off balance while another would hang onto it. It also appeared that some hoppers would open easily and others hard and if the wrench [fol. 10] got away it would be *be* apt to "snap down" the person who had been using it, and that "you have either to let go the wrench or else it will yank you down." Another witness testified that if you hang onto the wrench "it is liable to throw you"; and another that when the wrench is pulled back and the dog released that "if you don't look out you are liable to go down." Consequently, regardless of the question of whether the frog wrench was a proper tool to be used in opening hoppers under ordinary circumstances, the evidence above noted concerning it could properly be considered by the jury in connection with the evidence as to Bailey's lack of experience and his narrow foothold in determining whether he was furnished a reasonably safe place to work under all the circumstances disclosed.

The evidence as to the Swaco safety hopper wrench is also material on this point. There was evidence that the

defendant owned several of them and that prior to the accident one had been allocated to the maintenance of way department in which Bailey was employed. One of these wrenches was an exhibit in the case and it is apparent from an inspection thereof that the jury could have found that if Bailey had had such a wrench he could have made it impossible for it to pull him forward merely by shifting with his fingers the lever on the handle that controlled the ratchet. There was no evidence as to whether such a wrench was available for use by Bailey or other workmen at the time in question. The jury could reasonably have found that due care required the defendant to have one there for use and that the failure to so provide unnecessarily increased the danger of doing this work at the place in question. The fact emphasized by the defendant that the Swaco wrench cost $18.50 more than the frog wrench does not seem very important.

Moreover, there was evidence in the case to warrant the jury in finding that the hopper could have been opened [fol. 11] before spotting the car on the bridge and that then it could have been drawn upon or across the same and by the use of a railroad tie as a drag a good share of the cinders would have been deposited under the bridge. The testimony of witness- Morello and Lashua was to that effect. Counsel for defendant attempted on cross examination to break down the testimony of Lashua and have it appear that the only purpose or reason for opening the hopper and then moving the car so as to distribute the load would be to place the whole load over a long surface of track and not in one place. On re-direct examination this witness was asked whether it is entirely possible to open the hopper and then move the car and empty the cinders in one place and he answered that it was. No doubt some shovelling would have been necessary but a gang of about twelve men was available therefor and certainly the jury could reasonably have found that this way was safer than the one used. In determining whether in the exercise of due care it should have been employed, the question of its feasibility would arise but the evidence above noted would fully warrant an affirmative finding on that score. In my opinion this alternative method of dumping and distributing *and* cinders was a very material element for consideration by the jury in determining whether under the circumstances the defendant exercised reasonable care in furnishing a safe place to work.

The jury also could reasonably have found that the cinders were being dumped for no purpose connected with railroading but merely to repair or restore the cattle way under the bridge which had been washed out and were so dumped at the request of the farmer who used this roadway. This view of the evidence is strenuously contended for by the defendant in support of its claim that Bailey was not engaged in interstate commerce at the time of the accident. [fol. 12] To summarize, the jury could reasonably have found that the defendant permitted Bailey, wholly inexperienced in opening hoppers, to perform this work for the first time in a dangerous place with a tool dangerous to be there so used for a purpose not necessary to the maintenance of way of the defendant when a safer and feasible way could well have been employed. Certainly this finding would have warranted them in determining that the defendant had not fulfilled its duty, as laid down by the majority, of reasonable care, having regard to the circumstances, to furnish a safe place for Bailey to work at the time of the accident, but, to the contrary, they would have been justified in finding that the defendant by its negligence had made his place of work unnecessarily hazardous. The facts here do not disclose that the work was of an emergency nature nor that it necessarily had to be done in the way it was or within a limited time to keep traffic moving, reasons which might ordinarily be given for furnishing extra hazardous places to work. It is difficult for me to conceive of a stronger case for a plaintiff in support of this claim of negligence than the one here disclosed by the evidence.

The cases cited by the defendant on this claim of negligence are not in point. The gist of the defendant's argument is that this bridge was properly constructed and reasonably adequate to carry trains and that construction matters are for decision by the railroad and not by the courts. This line of argument, and the cases supporting it, are entirely beside the point. I do not question but that this bridge was properly constructed and adequate for the passing of traffic but surely the jury could find that it was not a proper place for the use to which it was put by the defendant on the day in question.

[fol. 13] I now turn to the treatment by the majority of this claim for negligence. In my opinion they have not logically or effectively disposed of the same. Let us see

how they have answered the evidence bearing on this point which they have set forth in their statement of facts and which I have added to somewhat by referring to certain other evidence which I deem material. They have stated a few general principles of law, supported by cases with facts which they do not claim are at all similar to the ones here presented. I agree to the principles set forth but none of them bar the plaintiff in its claim on this point. They then make the statement "That there was no evidence tending to show that the space on the bridge beside the cinder car was not a reasonably safe place under the circumstances in which to open the hopper." In support of their statement they merely allude to the width of the space as being 12 inches. True, it was 12 inches if the projecting ties are taken into account but, as before shown, the jury could reasonably have found that the only space available for a foothold was that of 8 or 9 inches on top of the stringer. They then say "but there was no claim nor evidence of accident when cinders had been previously dumped there, or that on those occasions the operation was not performed on the bridge and in the same manner." One answer to this statement is that it was unnecessary for the plaintiff in order to prove negligence to show that the same procedure on the part of the defendant had previously resulted in injury. The dumping of cinders to which the majority refer covered a period of some few years and was done about once a year. Whether on those occasions the cinders were or were not dumped in the manner here attempted is not disclosed by the evidence. Even if on rare occasions the feat had been successfully accomplished this fact would have little if any probative value in determining the question of whether Bailey was furnished a [fol. 14] safe place to work under the circumstances disclosed by the evidence.

The majority dispose of the claim that the alternative way of dumping the cinders was safer on the ground, apparently, that each was reasonably safe, but in so doing they beg the question. They hold, in effect, that the way taken was reasonably safe without, as far as it appears, taking into consideration the other method which, as before shown, was a material element for the jury's consideration in determining this very question of safe place. Then, after so holding, they say that the defendant had a choice of two reasonably safe ways so it cannot be consid-

ered negligent for employing the one it did. The fallacy of this reasoning is apparent.

I am also of the opinion that there was a jury question as to whether the defendant owed a duty to Bailey of adequate caution and warning. The defendant has not touched this point in either of its briefs nor did it below in the argument on its motion for a directed verdict. Consequently, I need discuss only the reasons given by the majority for their holding that the evidence discloses no failure of duty in this respect. The answer to all of their statements in regard to what Bailey must have learned from his experience as a section man and the recital of what his actions showed in this respect, is that the evidence of his lack of experience in opening hoppers and the lack of uniformity in method and result of the same made a jury question on this point. It cannot be said as a matter of law, in view of this evidence, that the dangers inherent in the use of the wrench were so obvious as to relieve the defendant of its duty to caution and warn.

They also state that in view of the fact that he voluntarily took upon himself the work of opening the hopper and the lack of knowledge of the foreman of this inexperience, it is impossible to see why the latter could not rea- [fol. 15] sonably assume that Bailey knew how to do the work, or why he was under any duty to forbid him to do it. The fact that the foreman did warn Bailey at the last moment was some evidence indicating that the foreman felt called upon to warn. Bailey was not known to the foreman. The jury might well have found that due care required him to ascertain Bailey's experience in such work before permitting him to undertake it in that dangerous place. There was ample evidence in the case to make a jury question on this point.

The majority say, however, that if any warning was necessary Stone's caution was to the point and timely. In my opinion the jury might reasonably have found that it was neither. Where the duty of warning and instruction exists, the employer must give such instructions and cautions as are sufficient to enable the employee to appreciate the dangers and the necessity for the exercise of due care and precaution to prevent injury to himself to the extent that this is possible by taking proper care. The question whether in the particular case the warning to or instruction of the employee was adequate or sufficient is, ordinarily, one

for the jury's determination. 35 Am. Jur. 583, Sec. 152. Certainly it cannot be said as a matter of law that this warning was adequate and timely. It gave Bailey no instructions as to the proper use of the wrench at that place, nor any caution as to the result that might occur if he hung onto if after the hopper started to open, nor any warning that it might open easily or hard. The jury could well have found that the warning was not timely as it was not given until Bailey had started to open the hopper and they might have concluded that it had at that time the effect of confusing, rather than helping, him.

The following language appearing in the opinion in Hayes v. Colchester Mills, 69 Vt. 1, 8, is much in point on this question of warning and caution: "It is said that the previous service of the plaintiff had been such that this [fol. 16] employer was justified in assuming that he was fitted to undertake the work required of him. The length of time the plaintiff had been employed there, the nature of the work he had been engaged in, and the knowledge he had acquired of the machinery, were important to be considered by the jury, but afforded no basis for a conclusion of law. Inasmuch as the evidence tended to show that this was a service essentially different from any before required of him, it could not be assumed that his experience was such that instructions were unnecessary."

The fact that Bailey undertook this work voluntarily, while important on any questions of assumption of the risk of contributory negligence, cannot have the effect of making inapplicable the foregoing statements from the Hayes case, where the work in question was ordered done, on this question of defendant's negligence. Bailey was not a mere volunteer or interloper, but a workman, there to do whatever work was necessary, though possibly overambitious or even unwise in attempting the particular task which he undertook to perform. He was permitted, however, by the defendant to do it and the fact that he was not ordered cannot alter the responsibility of the defendant for the result. The statements made in that case apply equally to the situation here presented and are a sufficient answer to all that the majority say on this point and should be followed.

In their treatment of the claim of failure to furnish proper tools the majority state the applicable rule of law. They conclude their discussion on this point with another

statement with which I find no great fault for, as before indicated, I am inclined to agree that the frog wrench may have been a proper tool to open hopper cars in places where they ordinarily would be spotted. Whether it was such a tool to be used by Bailey under the circumstances here [fol. 17] shown is another question. I should also be inclined to agree that the ordinary plumber's blow torch is suitable for use under ordinary circumstances but I would not concede, and I doubt whether the majority would, that an employer could properly furnish it to his workman for use in a room filled with gasoline fumes. However, I have chosen to discuss the furnishing of the wrench in connection with the claim of failure to provide a safe place to work, rather than to treat it as an independent claim of negligence, so will refer to it no further.

In my opinion a jury question was presented as to negligence in respect of failure to provide a safe place to work, and to caution and warn, and the lower court was correct in submitting these issues and the jury was fully warranted in finding for the plaintiff on one, or both. In view of the holding of the majority there is no need to discuss the other questions raised by the exceptions.

BUTTLES, J.:

I concur in the foregoing dissent but would add briefly thereto. It would seem that Bailey's fall must have been caused either by his slipping, by his being pulled by the wrench when the hopper opened, or by his losing his balance when it suddenly opened while he was pushing on the wrench. The immediate sequence of events was such as to raise a strong inference that Bailey's slipping, if he slipped, was caused by his exertion in doing the work in which he was engaged. If the fall was caused by his pushing on the wrench the defendant is not thereby absolved from negligence. It appears that there was often resistance to the opening of hoppers because they stuck. Bailey could not know in advance whether such resistance would be met, nor could he know how much force would be needed to overcome the same if there should be resistance. When the dog that held the hopper closed was removed, the weight of the [fol. 18] material in the hopper and above it did not open it. It was necessary to use force and Bailey pushed on the wrench. The force used was not sufficient and the hopper

did not open. Again he pushed, of course using such force as he thought necessary to accomplish his purpose. If he misjudged the amount of force necessary and as a result lost his balance, or if he slipped because of his exertion or if he was yanked or pulled by the wrench, the situation so far as this defendant's negligence is concerned is the same. The narrow footing gave him no chance to save himself.

Under the circumstances it could well be found that reasonable care was not used to furnish Bailey with a safe place in which to do the work required to be done. That the various possibilities of the way in which the accident occurred are not set forth in detail by the plaintiff is immaterial. We seek to affirm the judgment below and it is our well established rule that when the result is an affirmance of the judgment it is immaterial that the plaintiff does not assert the ground of decision adopted in this Court. Duchaine v. Phoenix, 100 Vt. 11, 116.

FILE COPY

Petition not granted

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 640

FLORENCE J. BAILEY, as Administratrix of Bernard E. Bailey,

Petitioner,

vs.

CENTRAL VERMONT RAILWAY, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF VERMONT.

PETITIONER'S BRIEF.

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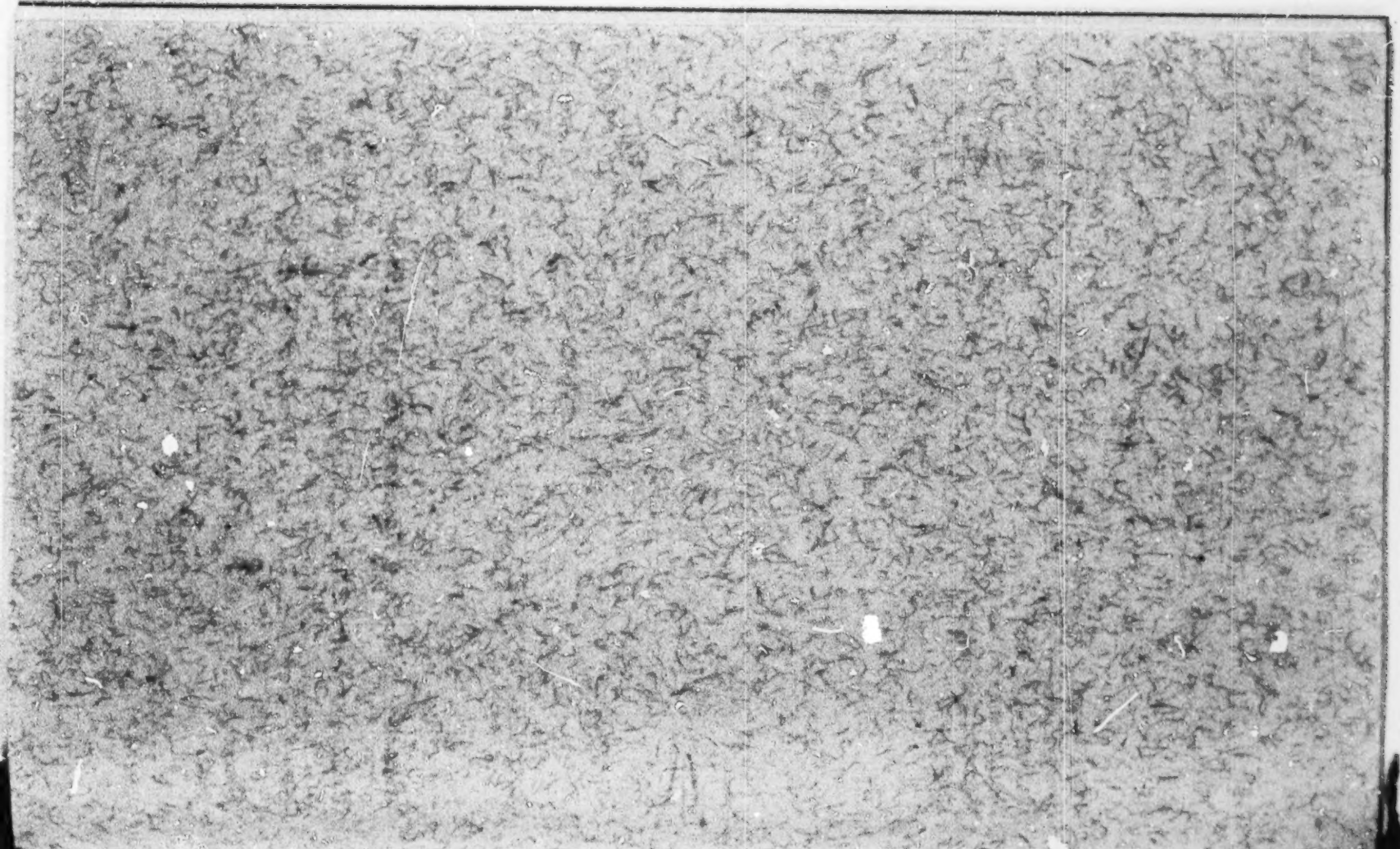

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 640

FLORENCE J. BAILEY, AS ADMINISTRATRIX OF BERNARD E. BAILEY,

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CENTRAL VERMONT RAILWAY, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF VERMONT.

PETITIONER'S BRIEF.

Official Report of Opinions Below.

No opinion was rendered in the Washington County Court of the State of Vermont. The opinions rendered in the Supreme Court of Vermont have not yet been officially reported. They are printed in connection herewith.

Grounds of Jurisdiction.

The question presented by this case is a substantial one. It is, briefly, the right of petitioner to recover of respondent

under the Federal Employers' Liability Act (U. S. C. A., Tit. 45, 51-59), under the evidence in the case viewed in the light most favorable to her. The interpretation of that Act is necessarily involved, and the right was denied by the Supreme Court of Vermont as a matter of law. The question is what constitutes actionable negligence under the Act, and the majority opinion below is not in accord with the applicable decisions of this Court.

The question of the applicability of the Federal Employers' Liability Act and of liability thereunder was raised in the trial court by petitioner's complaint, where the Act was specifically pleaded. The decision of the Supreme Court was based entirely upon interpretation of the Act (R. 4-5, fol. 5-6). That Court held the Act applicable and purported to determine petitioner's rights thereunder, denying that she had a cause of action under the terms thereof.

Petitioner's complaint in the trial court specifically pleased the Federal Employe[illegible]s' Liability Act.

> "1. In an action of tort, for that, at all times hereinmentioned, defendant was and now is a public service corporation organized and existing under the laws of this state and was and is a common carrier by railroad engaged in interstate commerce, and that plaintiff's intestate at all times hereinafter mentioned was employed by defendant in such interstate commerce; that such employment was within the terms of an Act of Congress, entitled, 'An Act Relating to the Liability of Common Carriers by Railroad to Their Employees in Certain Cases,' commonly known as the Federal Employers Liability Act."

The opinion of the Supreme Court of Vermont specifically held:

> "We are here dealing with a Federal statute which supersedes all state laws covering the same field.

Mondou v. New York, N. H. & H. R. Co., 223 U. S. 1, 56 L. Ed. 327, 32 S. Ct. 169, 38 L. R. A. (N. S.) 44; *Robey v. Boston & Maine Railorad*, 91 Vt. 386, 389, 390. In proceedings under the Act the rights and obligations of the parties depend upon it and applicable principles of the common law as interpreted and applied in the Federal Courts. *Chesapeake & O. R. Co. v. Kuhn*, 284 U. S. 44, 76 L. Ed. 157; *Robey v. Boston and Maine Railroad, supra.*" (R. 4, fol. 5)

Section 237 of the Judicial Code, as amended (U. S. C. A., Tit. 28, Sec. 344), provides in its pertinent portion:

"(b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had * * * where any title, right, privilege, or immunity is especially set up or claimed by either party under * * * any statute of * * * the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied * * *."

The jurisdiction of this Court to review the judgment below is supported by the following cases:

Seaboard Air Line Ry. v. *Renn*, 241 U. S. 290, 60 L. Ed. 1006, 36 S. Ct. 567;

Chicago, R. I. & P. Ry. Co. v. *Devine*, 239 U. S. 52, 60 L. Ed. 140, 36 S. Ct. 27;

Lilly v. *Grand Trunk W. R. Co.*, No. 124, Oct. Term, 1942, 87 L. Ed. 323;

Schlemmer v. *Buffalo R. and P. R. Co.*, 205 U. S. 1, 51 L. Ed. 681, 27 S. Ct. 407;

Union Pacific R. Co. v. *Hadley*, 246 U. S. 330, 62 L. Ed. 751, 38 S. Ct. 318.

Statement of the Case.

This was an action at law brought by petitioner against respondent in the Washington County Court of the State of Vermont, under the Federal Employers' Liability Act. Verdict and judgment were rendered for petitioner, and respondent appealed. The Supreme Court of Vermont, in a 3-2 decision, held that respondent's motion for a directed verdict should have been granted, reversed the trial court, and rendered judgment for the respondent. This Court granted certiorari.

Viewed in the light favorable to petitioner, the evidence in the trial court showed the following facts:

Petitioner's intestate had been employed as a section hand by respondent railway for five years prior to the accident in question. (T. 61) On May 14, 1940, while so employed, he suffered a fatal injury. (T. 11, 13, 24) On that day, with one member of his own section crew, and ten members of other crews (T. 12, 13, 33) he went on a work train to a point on the railway in Williston, Vt. (T. 11, 12, 28) During the day the crew unloaded track material (T. 12) to be used on the road bed (T. 46) This work completed around 4 o'clock, (T. 13, 55) instructions were given to unload a cinder car, which was pulled out onto an overpass, or bridge. (T. 13)

The floor of this bridge was about 18 feet above the ground. (T. 14) The only available footing at the side of the car was about 12 inches wide, 8 or 9 inches of which was a raised stringer. (T. 28, 29) A hopper car is opened at the side by one man turning a nut on the end of a shaft, while another disengages a dog holding the nut. The release of the dog enables the weight of the material in the car to open it, spinning the nut at the end of the shaft. (T. 35, 74, 80, 138)

Intestate was unfamiliar with the method of opening a hopper car. (T. 22, 33, 58, 64, 69, 74, 76) He had been present on a few occasions when it was done, but usually on top of the car. (T. 67, 74) He had never been instructed in the use of any wrench for this purpose. (T. 47, 48, 66, 77) If the operator does not immediately let go of the frog wrench in this operation, it will yank him or snap him down. (T. 37, 74, 80, 138)

The wrench used, a frog wrench with a three foot handle, (T. 18, 34) is ordinarily used to tighten nuts on rails. (T. 66, 67) Intestate, who alone with one other of the crew had no shovel, (T. 56, 96) took the wrench from another member of the crew and proceeded onto the bridge to open the hopper car (T. 96) As he put the wrench on the nut, a section foreman told him, "Be careful the wrench does not catch you." (T. 35) As soon as he said this, intestate pushed on wrench, the hopper opened, the nut spun, and intestate was thrown by the wrench into the roadway below. (T. 35) He received injuries from which he died (T. 11, 13, 24) leaving a widow and three children (T. 82, 83)

The car could have been opened before moving it onto the bridge. (T. 31, 65) Respondent owned a number of wrenches of the ratchet, or "safety" type. (T. 84, 133)

Assignment of Errors.

1. The Supreme Court of Vermont erred in holding there was no jury issue of negligence where respondent permitted an employee without previous experience in opening hopper cars to do this work for the first time upon a bridge 18 feet above the ground, on the side of the car, with the only available footing a space about 12 inches wide, 8 or 9 inches of which was a raised stringer.

2. It further erred in holding there was no jury issue of negligence under all the circumstances of 1) supra, when

an alternate method of dumping the car, in question, involving none of these dangers, could have been utilized.

3. It further erred in holding there was no jury issue of negligence, when, under all the circumstances of 1) & 2) supra, respondent supplied this employee with a wrench not of a safety type, such type being available.

4. It further erred in holding there was no jury issue of negligence under the circumstances of 1), 2), and 3), supra, when respondent failed to furnish the employee with instructions covering the work he was to do, or warning of the dangers inherent in that work under such circumstances.

5. It further erred in failing to consider the respective elements of negligence as a whole, instead of separately, as required by the decisions of this Court.

Summary of Argument.

Petitioner's argument covers four main points. These are:

1. That the Supreme Court of Vermont erred in holding there was no jury question as to negligence in supplying a safe place to work.

2. That the Supreme Court of Vermont erred in holding there was no jury question as to negligence in furnishing an unsafe tool.

3. That the Supreme Court of Vermont erred in holding there was no jury question as to negligence in failing to instruct or warn.

4. That the Supreme Court of Vermont erred in failing to view the respective elements of negligence as a whole.

ARGUMENT.

I. Respondent was negligent in failing to use reasonable care in furnishing its employees a safe place to work under the circumstances.

The argument advanced here covers Nos. 1 and 2 of petitioner's Assignment of Errors.

It is axiomatic that, while the employer is not a guarantor of his employee's safety, he is bound to use ordinary care in furnishing him a safe place in which to work.

Washington & Georgetown R. Co. v. *McDade*, 135 U. S. 554, 34 L. Ed. 235, 10 S. Ct. 1044;

Patton v. *Texas & P. R. Co.*, 179 U. S. 658, 45 L. Ed. 361, 21 S. Ct. 275.

> "He is bound to take reasonable care and make reasonable effort,; and the greater the risk which attends the work to be done and the machinery to be used, the more imperative is the obligation resting upon him. Reasonable care becomes, then, a demand of higher supremacy; and yet, in all cases, it is a question of the reasonableness of the care; reasonableness depending upon the danger attending the place or the machinery."

Patton v. *Texas & P. R. Co., supra*

> "The duty of the master to use reasonable diligence in providing a safe place for the men in his employ to work in and to carry on the business of the master for which they are engaged has been so frequently applied in this court, and is now so thoroughly settled, as to require but little reference to the cases in which the doctrine has been declared."

Kreigh v. *Westinghouse, etc. Co.*, 214 U. S. 249, 53 L. Ed. 984, 29 S. Ct. 619.

Thus, under this rule, where a wooden walkway was maintained on a railway bridge for the use of trainmen, only 34

inches wide, the limitation of space required reasonable precaution in maintaining an adequate and safe guardrail.

Thomson v. *Boles*, 123 F. (2d) 487, cert. den. 62 S. Ct. 632, 86 L. Ed. 563.

And, placing a train upon a track so that a switch tender was compelled to mount a coupling to cross the track was a violation of his employer's duty to furnish him a safe place in which to work.

Lehigh V. R. Co. v. *Scanlon*, 259 F. 137, 170 C. C. A. 205.

A railroad engaged in interstate commerce owes an employee a duty of ordinary care, to the end that the place in which the work is to be done, and the tools and appliances furnished be safe to use in doing this work.

Atlantic C. L. R. Co. v. *Hardwick*, 239 Ala. 58, 193 So. 730.

Where a servant is required to work in a dangerous and unsafe place, the master is responsible for any injury he may sustain on account of such unsafe and dangerous condition.

Coal, etc. R. Co. v. *Deal*, 231 F. 604, 145 C. C. A. 490, error dismissed, 245 U. S. 681, 62 L. Ed. 544, 38 S. Ct. 345.

The above cases clearly establish respondent's duty of reasonable care in furnishing a safe place for the employee to work. It is indisputable that any duty of reasonable care requires an examination of the attendant circumstances for a determination as to whether or not the duty has been fulfilled. The circumstances of this case, a bridge 18 feet in the air (T. 14) with a foothold of uneven surface only 12 inches wide (T. 28, 29), not only justify, but almost compel, a jury finding of negligence. Couple these circumstances

with the further fact that the employee was not versed in this type of work (T. 22, 33, 58, 64, 69, 74, 76) and the further fact that the car in question could have been opened upon level ground (T. 31, 65) and the dereliction in duty becomes even more striking. Petitioner submits that the general rule as to duty is clearly defined, and the circumstances of this case a clear violation of that duty. These facts, as urged in petitioner's Assignment of Errors, 1 and 2, clearly demonstrate the unreasonableness of the holding of the Supreme Court of Vermont that there was no evidence to support a finding of negligence in this respect. Indeed, as the first dissenting opinion states:

> "It is difficult • • • to conceive of a stronger case for a plaintiff in support of this claim of negligence than the one here disclosed by the evidence."
> R. 10, fol. 12.

Facts were before the jury from which the jury could find that it would have been practicable under the circumstances to open the car in question upon level ground, and that the failure to do so was, under the circumstances, negligent, in that it created unnecessary dangers. This alone was sufficient basis for the verdict of the jury.

> "Where workmen are engaged in a business more or less dangerous, it is the duty of the master to exercise reasonable care for the safety of all his employees, and not to expose them to the danger of being hurt or injured by the use of dangerous appliances or unsafe place to work, where it is a matter of using due skill and care to make the place and appliances safe. There is no reason why an employee should be exposed to dangers unnecessary to the proper operation of the business of his employer."
>
> *Kreigh* v. *Westinghouse, etc., Co.*, 214 U. S. 249, 53 L. Ed. 984, 29 S. Ct. 613.

"It was the duty of the plaintiff in error to use reasonable care to so conduct its business as not to subject its servants to unnecessary danger in the prosecution of their work, and to guard against accidents in the performance of his work, which, in the exercise of reasonable care, could be foreseen and guarded against."

Lehigh Valley R. Co. v. *Scanlon*, 259 F. 137, 170 C. C. A. 205.

II. Respondent was negligent in failing to supply its employee with a wrench of the safety type, especially when such a type was available.

Here again the general standard of law has been many times repeated. The employer has a duty to furnish the employee reasonably safe tools and appliances with which to work.

Chicago & N. W. R. Co. v. *Bowers*, 241 U. S. 470, 60 L. Ed. 1107, 36 S. Ct. 624;

Kreigh v. *Westinghouse, etc., Co.*, 214 U. S. 249, 53 L. Ed. 984, 29 S. Ct. 619.

It is not petitioner's contention that this rule automatically requires the adoption of the latest, best, and safest appliances, if those in use are reasonably safe and adequate. The rule in this respect is clearly stated in the *Bowers* case, supra:

"The rule of law is: That the employer is under duty to exercise ordinary care to supply machinery and appliances reasonably safe and suitable for the use of the employee, but is not required to furnish the latest, best and safest appliances, provided those in use are reasonably safe and suitable."

It is not, therefore, urged, that if respondent had failed to purchase any wrenches of the safety type for opening hop-

per cars, that fact alone would constitute negligence. But such is not the situation in the case at bar. Respondent had purchased quite a sizeable number of these wrenches, and owned them at the time of the accident (T. 84, 133). What it did was fail to make available to its employee the safety appliance that it owned. Moreover, this fact does not stand alone. It must be considered in connection with all the other circumstances disclosed at the trial.

Union P. R. Co. v. *Hadley*, 246 U. S. 330, 62 L. Ed. 751, 38 S. Ct. 318.

This bridge, upon which the work was to be done, was 18 feet above the ground (T. 14). The available footing was at most 12 inches wide (T. 28, 29). Intestate was unfamiliar with the operation to be performed (T. 22, 33, 58, 64, 67, 69, 74, 76). He was not instructed (T. 47, 48, 65, 77). And despite all these circumstances, the tool furnished him was the frog wrench with all its dangers for a man unversed in its use in this operation. Both types of wrench were exhibits in the case (Pltf. Ex. 4, T. 120, Ex. B, T. 41). The jury was perfectly justified in finding that under all these circumstances respondent owed a duty and violated that duty. The duty was not, as some of the cases indicate would not be required, of purchasing safety wrenches, but merely a duty of supplying this type of wrench, which it had in its possession, for this particular operation. In short, where the operation was a perilous one, apt to throw the person operating the wrench (T. 37, 74, 80, 138), it was a completely justified finding that the duty of ordinary care was not satisfied by supplying a frog wrench, dangerous to one unversed in its use, in a place so fraught with peril.

The consequences of the failure of the court below to observe the rule of *Union Pac. R. Co.* v. *Hadley*, supra, and to consider the various elements of actionable negligence

as an entity, are well illustrated in the first dissenting opinion:

> "In their treatment of the claim of failure to furnish proper tools the majority state the applicable rule of law. They conclude their discussion on this point with another statement with which I find no great fault for, as before indicated, I am inclined to agree that the frog wrench may have been a proper tool to open hopper cars in places they ordinarily would be spotted. Whether it was such a tool to be used by Bailey under the circumstances here shown is another question. I should also be inclined to agree that the ordinary plumber's torch is suitable for use under ordinary circumstances but I would not concede, and I doubt whether the majority would, that an employer could properly furnish it to his workman for use in a room filled with gasoline fumes" (R. 13-14, fol. 16-17).

III. Respondent was negligent in failing to furnish its employee with instructions covering the work he was to do, or warning of the dangers inherent in that work.

Here again there can be little dispute as to the standard of care required of the employer. He is required to warn the employee of dangers which are, or should be, known to him, and which are not apparent to the employee.

Standard Oil Co. v. *Brown*, 218 U. S. 78, 54 L. Ed. 939, 30 S. Ct. 669.

Thus, an employer who fails to warn his employee, working in a dimly lighted stable, of the danger of hay being passed down through a hole in the ceiling of the stable, is negligent in this respect.

Standard Oil Co. v. *Brown, supra.*

And the failure of a foreman to warn a section hand, before prying a loose rail which he knew would jump on being loosened, makes a jury question as to negligence.

Pyatt v. *Southern Ry. Co.*, 199 N. C. 397, 154 S. E. 847.

And where a brakeman was injured on his first trip for pay, after taking two or three student trips, it was a jury question as to whether the railroad was negligent in failing to instruct him as to the proper and safe method of discharging his duties.

Cincinnati, N. O. & T. P. Ry. Co. v. *Davis*, 273 F. 481.

And whether an 18-year old section hand comprehended and fully appreciated the danger of standing on the front end of a hand car and working the lever, in the absence of warning thereof and advice as to means of avoiding danger, was a jury question.

Mills v. *Virginian Ry. Co.*, 85 W. Va. 729, 101 S. E. 604, Cert. den. 254 U. S. 629, 65 L. Ed. 447, 41 S. Ct. 6.

This, then being the recognized rule of law, the pertinent consideration is its application to the facts of this case. The testimony is ample that the conditions under which this operation was performed were exceptionally dangerous, and that the tool furnished was one perilous under these circumstances to one not experienced in its use. No warning of the dangers of the task was given, although foreman Stone was working with intestate in this very operation, and had never seen intestate before, so that he could have known nothing of his experience (T. 33). And Stone himself knew of the dangers of the work, for he gave intestate a general warning to be careful (T. 35). This warning contained no instructions, nor did it point out just what the peril involved was (T. 35). In this respect it fell far short of satisfying the rule. Intestate's death was the result of this failure.

In this respect the Court below stated that:

> "It is inconceivable that as an experienced workman he did not know what was likely to happen when the hopper began to open" (R. 6, fol. 8).

Such an assumption is completely unwarranted. The testimony as to his lack of experience in this operation (T. 22, 33, 58, 64, 69, 74, 76) made a jury question, as the first dissent clearly pointed out (R. 12, fol. 14).

Moreover, a further important consideration in this case is the implicit recognition, throughout the majority opinion, of assumption of risk as a bar to this action. This is not expressly stated, but it may be seen latent in the reasoning of the Court.

> "It is inconceivable that as an experienced workman, he did not know what was likely to happen when the hopper began to open" (R. 6, fol. 8).
>
> "Moreover, as to the claim that Bailey had never opened a hopper before and was inexperienced in that regard, it should be noted that so far as appears he had a free choice as to whether he would go on top of the car as he had theretofore done or use the wrench" (R. 7, fol. 8).

Such argument is, of course, fallacious, in view of the 1939 amendment to the Federal Employers' Liability Act, abolishing assumption or risk as a defense in toto. Even if the argument so advanced were logically tenable in light of the evidence, it only reduces and does not bar recovery.

> *Tiller* v. *Atlantic & C. L. R. Co.*, No. 296 Oct. Term, 1942, 87 L. Ed. 446.

The decision below expressly contravenes the rule of the Tiller case:

> "We hold that every vestige of the doctrine of assumption of risk was obliterated from the law by the 1939 amendment, and that Congress, by abolishing the defense of assumption of risk in that statute, did not mean to leave open the identical defense for the master by changing its name to 'non-negligence'. As this Court said in facing the hazy margin between negli-

gence and assumption of risk as involved in tne Safety Appliance Act of (March 2) 1893, 45 U. S. C. A. #1. 'Unless great care be taken, the servant's rights will be sacrificed by simply charging him with assumption of the risk under another name;' and no such result can be permitted here."

Tiller v. Atl. & C. L. R. Co., supra, at 448, 449.

As did the Court below in the Tiller case, the Supreme Court of Vermont applied the doctrine of assumption of risk under the guise of non-negligence, and failed to recognize that the Act sets up a comparative negligence rule in this respect, as well as will respect to contributory negligence. The decision below, holding there was no jury question as to negligence, deserves reversal for this reason alone, aside from the other questions involved.

IV. The Supreme Court of Vermont erred in failing to consider the respective elements of negligence as a whole.

An analysis of the opinion below shows that it considered each element of negligence separately and apart from each other element. In simple terms, the majority reasoned thus:

a) No failure to furnish a safe place to work.

1) Respondent was not an insurer—and courts will not allow juries to prescribe the space it must give its employees (R. 5, fol. 6).

2) Even though space was only 12 inches wide, cinders had been dumped in this manner before without accident (R. 5, fol. 6).

3) Respondent did not have to use the safer method, so long as the one it used was reasonably safe (R. 5, fol. 7).

b) No failure to furnish proper tools.

1) Respondent could furnish any tool reasonably safe (R. 5-6, fol. 7).

c) No failure to warn.

1) The danger was obvious; intestate must have known it; he had a free choice of what job he was to do (R. 6-7, fol. 8).

2) The warning given was adequate (R. 7, fol. 8).

The inadequacy of all these arguments in the light of the evidence has already been pointed out in the preceding sections of this brief. Suffice it to say here that the argument as to a safe place to work ignores the nature of the tool and the operation, as well as the experience of the workman; that the argument as to propriety of the tool ignores the place and the employee's experience; that the argument as to warning ignores the circumstances of place, tool, and experience, aside from the fact that it neither instructed or gave notice of the particular danger.

This type of opinion ignores the picture presented by the evidence as a whole. Dissecting the case, bit by bit, it refused to view each element in the light of the other factors presented by the testimony. Indeed, this was one of the grounds of the dissent:

> "In determining this question, the situation should be taken as a whole. So taken, there is evidence from which the jury could reasonably find that the defendant permitted its employee who had no previous experience in opening hoppers with firm ground for a footing to undertake this work for the first time in a dangerous place" (R. 7-8, fol. 9).

> "The majority dispose of the claim that the alternative way of dumping the cinders was safer on the ground, apparently, that each was reasonably safe, but in so doing they beg the question. They hold, in effect,

that the way taken was reasonably safe without, so far as it appears, taking into consideration the other method which, as before shown, was a material element for the jury's consideration in determining this very question of safe place. Then, after so holding, they say that the defendant had a choice of two reasonably safe ways so it cannot be considered negligent for employing the one it did. The fallacy of this reasoning is apparent" (R. 11-12, fol. 14.)

That such an interpretation of the Act defeats its very purpose seems almost self-evident. Pulling each separate factor from its factual setting distorts and discolors the facts as a whole, and gives only lip service to each of the rules of law involved. It is completely opposed to the standard of interpretation laid down for this Act by the late Justice Holmes:

> "On the question of its negligence the defendant undertook to split up the charge into items mentioned in the declaration as constituent elements and to ask a ruling as to each. But the whole may be greater than the sum of its parts, and the Court was justified in leaving the general question to the jury if it thought that the defendant should not be allowed to take the bundle apart and break the sticks separately, and if the defendant's conduct viewed as a whole warranted a finding of neglect. Upon that point there can be no question."
>
> *Union Pac. R. Co.* v. *Hadley*, 246 U. S. 330, 62 L. Ed. 751, 38 S. Ct. 318.

It is difficult to conceive of a judicial treatment of the facts here presented more in conflict with the principle of liberal construction of the Act in the light of its prime purpose, the protection of employes and others, set forth by Mr. Justice Murphy in *Lilly* v. *Grand Trunk W. R. Co.* (*No. 124, Oct. Term, 1942*) 87 L. Ed. 323, 325, than the treatment accorded this case by the Supreme Court of Vermont. It is submitted that the majority opinion below is a direct

invasion of the province of the jury, taking from their consideration as it does the determination of facts and proper inferences therefrom.

> "The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the Courts."
>
> *Jacob* v. *City of New York*, October Term, 1941, 86 L. Ed. 750, 751.

It is highly significant in this respect that the three justices, constituting the majority in the Supreme Court of Vermont, not only held unreasonable the findings of the twelve local citizens on the jury, but also the views of their two associates in the minority, as well as those of the three trial court judges who heard the evidence at first hand.

Conclusion.

Petitioner therefore respectfully urges that, for the causes aforesaid, the judgment of the Supreme Court of Vermont be reversed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 640

FLORENCE J. BAILEY, AS ADMINISTRATRIX OF BERNARD E. BAILEY,

Petitioner,

vs.

CENTRAL VERMONT RAILWAY, INC.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF VERMONT.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

HORACE H. POWERS,
Counsel for Respondent.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 640

FLORENCE J. BAILEY, AS ADMINISTRATRIX OF BERNARD E. BAILEY,
Petitioner and Appellee Below,

vs.

CENTRAL VERMONT RAILWAY, INC.,
Respondent and Appellant Below.

BRIEF FOR THE RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

Stripped of its legal verbiage, the petition for a writ of certiorari is based upon two grounds:

First, that a substantial Federal question has been decided by the Supreme Court of Vermont in a manner prejudicial to the petitioner, and

Second, that the decision of the Supreme Court of Vermont is "probably" in conflict with the decisions of this Honorable Court.

A survey of the Record will demonstrate that neither of these assertions is correct.

I.

There Is No Substantial Federal Question Involved.

This Honorable Court has had occasion many times to declare that it will not exercise its discretionary right to review the decisions of the highest Court of a State unless there is a substantial Federal question involved which is necessary for decision by the State Court.

Erie R. R. Co. v. *Solomon*, 237 U. S. 427.

Indeed, this Court has dismissed appeals for want of jurisdiction if no substantial Federal question appeared which was necessary for the decision.

Smith v. *Washington-Southern Ry. Co.*, 246 U. S. 650.

If there is no substantial and important Federal question involved, or if the decision can be justified without a consideration of such an important Federal question, this Honorable Court has refused to review the decisions of a State Court with consistent regularity.

Zucht v. *King*, 260 U. S. 174;
Slaker v. *O'Connor*, 278 U. S. 188;
Seaboard Airline Ry. v. *Watson*, 287 U. S. 86;
Lynch v. *N. Y. ex Rel. Pierson*, 293 U. S. 52;
Honeyman v. *Hanan*, 300 U. S. 14;
Honeyman v. *Hanan*, 302 U. S. 375.

In *Lynch* v. *N. Y. ex rel. Pierson, supra*, the Chief Justice said at page 54:

> "It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause, and that it was actually

decided or that the judgment as rendered could not have been given without deciding it."

In *Honeyman* v. *Hanan*, 300 U. S. 14, the Chief Justice said again at page 18:

"Before we can undertake to review a decision of the Court of a State it must appear affirmatively from the record, not only that the federal question was presented for decision to the highest Court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause."

The case at bar was one under a statute known as the Federal Employers Liability Act, but it is admitted in the petition herein that the only question presented was whether or not the respondent was negligent. Neither the Safety Appliance Act, the Boiler Inspection Act or any of the special statutes associated with the Federal Employers Liability Act are involved. Under the decision of the Supreme Court of Vermont, no question concerning assumption of risk or contributory negligence is involved. The Supreme Court of Vermont disposed of the case solely upon the ground that the respondent was not negligent.

This Honorable Court has firmly established the rule that negligence under the Federal Employers Liability Act does not depend upon any Federal statute but depends wholly upon common law principles.

Seaboard Airline Ry. v. *Horton*, 233 U. S. 492;
C. V. Ry. v. *White*, 238 U. S. 507;
Great Northern Ry. v. *Wiles*, 240 U. S. 444;
So. Ry. v. *Gray*, 241 U. S. 333.

In *Southern Railway* v. *Gray, Supra*, the Court said at pages 338-339:

"As the action is under the Federal Employers Liability Act, rights and obligations depend upon it

> and applicable principles of common law as interpreted and applied in Federal Courts, (citing cases)."

This Honorable Court has repeated and reaffirmed the quotation taken from *Southern Railway* v. *Gray* upon so many occasions that it has become firmly imbedded in the Act. Identical quotations may be found in *New Orleans etc. Co.* v. *Harris*, 247 U. S. 367 at page 371, in *Chicago, etc. Co.* v. *Coogan*, 271 U. S. 472 at page 474, and in *C. & O. Ry.* v. *Kuhn*, 284 U. S. 44 at pages 46-47.

Thus the United States Circuit Court of Appeals correctly stated in *Escandon* v. *Pan American Foreign Corporation*, 88 Fed. (2) 276, at page 277:

> "The statute (Federal Employers Liability Act) does not undertake to define negligence but leaves its significance to be determined by the common law as announced by the Federal Courts. Southern Railway Co. *v.* Gray, 241 U. S. 333, 36 S. Ct., 558, 60 L. Ed. 1030."

It thus appears that the negligence which is the basis for the claim in this case has to be decided upon the principles of the common law "as interpreted and applied in Federal Courts". However, since *Erie R. R.* v. *Tompkins*, 304 U. S. 64, it appears that there is no Federal common law but that the common law administered in Federal Courts is the common law of the State where the rights arise.

In view of this, an analysis of the decision of the Supreme Court of Vermont shows that the action is based upon a claim of common law negligence, which the Supreme Court of Vermont is well qualified to administer. It would seem that under the decision of *Erie R. R. Co.* v. *Tompkins, Supra*, the case should be considered upon the common law principles as administered in the Courts of Vermont. Whether this is so or not, it is respectfully submitted that the Supreme Court of Vermont had before it only the ques-

tion of common law negligence, which that Court is entirely competent to decide.

The decision of the Supreme Court of Vermont states:

> "In proceedings under the (Employers Liability) Act, the rights and obligations of the parties depend upon it and the applicable principles of the common law as interpreted and applied in the Federal Courts."

That is an exact quotation from *Southern Railway* v. *Gray, Supra*, and the other cited cases which fortify the *Gray* case. It will thus be seen that whether *Erie R. R. Co.* v. *Tompkins* has the effect stated in this Brief, the Supreme Court of Vermont has applied the common law of negligence in conformity with the mandate of this Honorable Court.

It is respectfully submitted, therefore, that even though the case is one arising under a Federal statute, the precise question involved is not a Federal question of any kind. The question involved does not depend for answer upon any Federal statute, nor upon any Federal regulation. The only question decided by the Supreme Court of Vermont was the question of common law negligence. It is therefore further respectfully submitted that not only is there no substantial Federal question in this case but that there was no Federal question raised nor decided by the Supreme Court of Vermont.

II.

The Decision of the Supreme Court of Vermont Is in Harmony with the Decisions of This Honorable Court.

In the argument that the Supreme Court of Vermont has departed from the decisions of this Court, the petition relies heavily upon *Union Pacific Ry. Co.* v. *Hadley*, 246 U. S. 330. The respondent does not question the force of that decision and admits that in this case the respondent's conduct must

be viewed as a whole on motion for a directed verdict. The Supreme Court of Vermont did just that. It is true that the various grounds of alleged negligence were considered in the charge of the Court below but the decision of the Appellate Court made no attempt to divide or isolate those several charges of negligence. In *Union Pacific* v. *Hadley*, supra, relied upon by the petitioner, Mr. Justice Holmes, in considering the evidence on page 333, analyzed the various charges of negligence, as was done by the Supreme Court of Vermont in this case. That separate consideration of these various elements is but a preliminary research prior to a final observation of the complete case. The record shows in this case case that the trial Judge below and the Appellate Court later considered the complete evidence as a unit.

Furthermore, the Supreme Court of Vermont recognized the controlling character of the decisions of this Honorable Court. As is stated in the petition herein, the Court said:

> "We are here dealing with a Federal statute which supersedes all State laws involving the same matter (citing cases)."

The only evidence which contradicts this unequivocal statement by the Supreme Court is the statement of counsel for the petitioner.

The petitioner relies further on three other decisions of this Court decided many years ago which have no significance upon the question presented here.

Schlemmer v. *Buffalo, Rochester, etc. Ry.*, 205 U. S. 1;
Chicago, etc. Ry. v. *Devine*, 239 U. S. 52;
Seaboard Airline Ry. v. *Renn*, 241 U. S. 290.

These cases relied upon by the petitioner need but passing attention. They represent decisions of this Honorable

Court in the special circumstances there presented. If these three cases had any special application to the case at bar, it can be confidently assumed that the Supreme Court of Vermont investigated them. In dealing with a Federal statute, the Supreme Court of Vermont recognized the controlling character of the decisions of this Honorable Court and cited them freely. No attempt was made by the Supreme Court of Vermont to substitute its own judgment for the judgment of this Honorable Court.

It is therefore respectfully submitted that the Supreme Court of Vermont did not depart from the decisions of this Honorable Court and that the petitioner's statement to the contrary is without merit.

III.

The Case at Bar Was Carefully Considered by the State Court of Vermont.

The case went to the Supreme Court of Vermont in the regular course and was argued at length there by counsel. The Supreme Court of Vermont held the case under consideration for several months, and then, sua sponte, ordered reargument. In October, 1942, the case was reargued at length by counsel on both sides, after which the decision was published. It will thus be seen that the consideration given this case by the State tribunal was both generous and deliberate. The petitioner had not one day in Appellate Court but two. The Supreme Court of Vermont gave the case unusual and careful consideration. As said before, the question involved was not one of a Federal nature but was one of common law negligence, which the State tribunal was perfectly equipped to handle.

In view of the full opportunity presented to counsel by the argument and reargument, and in view of the many

months of consideration given this matter by the highest tribunal of Vermont, it is respectfully submitted that this Court should not exercise its discretion for a review of this case.

IV.

Because there is no Federal question involved, because the Supreme Court of Vermont has recognized the authority of this Honorable Court and because of the careful consideration given this case by the State tribunal, it is respectfully submitted that the petition to proceed in forma pauperis and the petition for a writ of certiorari both should be denied.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 640

FLORENCE J. BAILEY, AS ADMINISTRATRIX OF BERNARD E. BAILEY,

Petitioner,

vs.

CENTRAL VERMONT RAILWAY, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF VERMONT.

RESPONDENT'S BRIEF.

HORACE H. POWERS,
Counsel for Respondent.

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RESPONDENT'S BRIEF.

Statement of the Case.[1]

Respondent has little criticism of the statement of facts compiled by Petitioner except: (1) for an inaccuracy which will be called to the Court's attention, and (2) that there are other important facts which should have the Court's attention.

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[1] Since the Court ordered that the transcript of testimony need not be printed, references are made to pages of the typewritten Transcript.

The Petitioner says:

> "Intestate was unfamiliar with the method of operating a hopper car. * * * He had never been instructed in the use of any wrench for this purpose."

The Record does not bear out these two statements. It is true that none of the witnesses examined had ever seen Petitioner's intestate open a hopper car but it is equally true that the decedent had had ample opportunity to observe the operation on many occasions. (Tr. 67, 69, 74) He was a bright young man and must be charged with the education thus presented to him in the use of a frog wrench for this purpose. Furthermore, Section Foreman Stone, who qualified as an expert in the use of a wrench for this purpose, (Tr. 48), and who stood right beside the decedent when he attempted to open this hopper car (Tr. 34, 47), says that the decedent required no prompting or instruction what to do. (Tr. 47-48) Stone says further that the decedent seemed perfectly familiar with the use of the wrench for this purpose, handled the wrench without awkwardness (Tr. 47) and did the job perfectly. (Tr. 48) In the face of this undisputed testimony, we respectfully submit that the Record does not admit the conclusion that intestate was unfamiliar with the method of operating hopper cars.

The statement that intestate had never been instructed in the use of the wrench is equally unjustified. It is admitted that he received the instruction of watching the operation performed on many occasions, (Tr. 67, 69, 74), and it is admitted that he was warned by Section Foremen Stone before he started to do this work. (Tr. 35) It is further admitted that he acknowledged the warning to be careful by saying "I will", or "Yes" or something like that. (Tr. 40) There is, therefore, a complete failure of proof on the issue of lack of instruction.

In fairness to the Court, we respectfully add to the Petitioner's statement of facts the following undisputed facts which we consider of vital importance.

Decedent was a young man between twenty-four and twenty-five years old (Tr. 63) who had worked for defendant as a sectionman for about five years. (Tr. 61 and 73) On the day in question, the Montpelier gang, the Williston gang and the Richmond gang were assembled at Montpelier Junction to work with the work train at different points between Montpelier and Williston. The train consisted of an engine, caboose, several cars containing track material and a car of cinders. (Tr. 12-13, 54-55) The work train with the three section crews left Montpelier Junction between 7.30 and 8.00 o'clock in the morning. (Tr. 55) The train proceeded along toward Williston, stopping to permit the men to do the work assigned to them. This work consisted of unloading steel along the right of way, which means the unloading of material such as rails, tie plates and the like along the right of way. (Tr. 12, 55) Some time between four and five o'clock that afternoon, the crews finished their labors of the unloading of track material from the cars and took up the disposition of the car of cinders which was in the train. (Tr. 13, 55, 101-102)

The bridge in question, known as Bridge 85, is as long as the cattlepass beneath it is wide, as will be seen from Defendant's Exhibits A, C, D and E. It consists of a bridge floor resting on stone abutments upon which floor are laid the rails over which the trains operate. On either side of the bridge are stringers upon which the sectionmen stand to work without being crowded by the overhang of the cars, (Exhibit A) and extending beyond the stringers are the ends of the ties which are laid crossways of the bridge. (Tr. 28) Some 18 feet below the bridge is a cattlepass through which the farmer drives his cattle from one side of the track to the other. (Tr. 14, 128)

On the day of the accident, after the cinder car had been spotted on the bridge, decedent walked over to Sectionman Muir. Muir had just got off from a motor car, some distance from the bridge, and had a long handled frog wrench in one hand and a shovel in the other. (Tr. 96, 98) The decedent came up to him and asked Muir for the wrench, (Tr. 96-97, 99) The decedent said to Muir, "I will take the wrench". (Tr. 96) Muir gave the decedent the wrench. (Tr. 97) The decedent did not explain to Muir why he wanted the wrench nor did Muir ask the decedent to take the wrench or order him to take it. (Tr. 99) Muir was not the decedent's boss and had no authority over him. (Tr. 99)

The decedent took the wrench and walked onto the bridge. (Tr. 34) Section Foreman Stone was standing on the bridge waiting to help whoever came to open the hopper. (Tr. 34) Stone was not Bailey's boss and had no authority over him. (Tr. 33, 38) Stone did not order decedent to get the wrench nor to open the hopper. (Tr. 58) In fact, Stone did not know who the decedent was and had never seen him before until that time. (Tr. 33) The decedent was a member of the gang whose boss was Morello. (Tr. 61) Section Foreman Morello, the decedent's boss, was not present at the scene of the accident that day. (Tr. 63)

After the decedent came on the bridge with the wrench, the decedent fitted the wrench to the nut on the end of the shaft of the car and released the dog. (Tr. 36, 53) Section Foreman Stone did not instruct him to do this and had no right to do so. (Tr. 38) While the decedent was fitting the wrench to the nut, Section Foreman Stone cautioned the decedent to be careful. Stone said to the decedent, "Be careful the wrench does not catch you". (Tr. 35) The decedent answered "I will", or "Yes" or something like that. (Tr. 40) The response was such that Section Foreman Stone knew his warning had been heard and

understood by the decedent. (Tr. 40) This conversation between Stone and the decedent was overheard by Muir, (Tr. 99) and by Section Foreman Fumagalli. (Tr. 135-136) Thereupon the decedent pulled the wrench back, which released the tension from the dog and Stone released the dog. (Tr. 36, 53) At this point, decedent fell from the bridge. No one knows what the reason for the fall was.

None of the witnesses examined had ever seen him open a hopper car but the decedent had been on top of a cinder car several times when these cars were being opened by others. (Tr. 67, 69, 74) It is fair to assume that he must have observed the opening of such cars on many different occasions. Furthermore, on the day in question, when the decedent attempted to open this car, Section Foreman Stone, who had opened many such cars, (Tr. 35), was of the clear opinion that decedent knew how to operate these hopper car pockets with this type of wrench. (Tr. 49) Stone stood along beside the decedent while decedent was engaged in opening this car and had ample opportunity to observe the way he did it. (Tr. 34, 47) Stone says that decedent was not awkward in the way he handled the wrench. (Tr. 47) Stone did not have to instruct him what to do, (Tr. 47-48), and, generally, the decedent seemed perfectly familiar with that operation. (Tr. 48)

The frog wrench is used for a variety of purposes by the sectionmen and is a part of the standard equipment for their work. (Tr. 73, 78-79, 133, 136-137) It has been in common usage on the section for many years. (Tr. 39, 42, 70, 75, 78-79, 133, 136-137) It has been used for years to open the hoppers of these cars. (Tr. 80, 138) It has been entirely satisfactory for that purpose. (Tr. 39, 80, 138) The Section Foremen have never complained about the inconvenience of this tool. (Tr. 134) A strong man can and does successfully hold the weight of the hoppers with

this wrench without letting go of the wrench and permitting the hoppers to open under their own weight. (Tr. 58) A one-armed man can and does open these hopper cars with this wrench. (Tr. 136) In all the years that this type of wrench has been used to open hopper cars, no one has ever been hurt in this kind of an operation. Section Foreman Fumagalli, who has been a sectionman for twenty-four years, testified that he never knew of anyone getting hurt with one of these wrenches while opening a hopper car. (Tr. 136, 138) Sectionman Pratt, who has been in the service for thirteen years, testified that he never knew of anyone getting hurt while operating a hopper car with one of these wrenches. (Tr. 75) Sectionman Bleu, who has been in the service for thirteen years, testified to the same thing. (Tr. 60) Section Foreman Stone, who has been in the service twenty-one years, also testified that he never knew of any one getting hurt while performing this operation with this type of wrench. (Tr. 39)

In undertaking to do this job without any instruction from anybody so to do, the decedent violated a company rule made for his protection. It is undisputed that there was a custom among sectionmen that the older men in the service open these hopper cars. (Tr. 73) The decedent was the youngest man in service in the crew. (Tr. 63) The decedent had been working on the section for six years, (Tr. 63) which was a sufficient length of time to enable him to know the custom of the sectionmen in this regard. Since Muir, from whom the decedent took the wrench, did not know the decedent (Tr. 95) and did not know what the decedent intended to do with the wrench (Tr. 97), and since Stone did not know the decedent (Tr. 33), no one could be charged with any knowledge, except decedent, that he was violating a company rule.

1.

The Alleged Failure to Furnish a Reasonably Safe Place to Work.

It is respectfully pointed out that while this failure to furnish a reasonably safe place to work is asserted here for reversal, there was no evidence produced below to justify that conclusion. The only place where this is mentioned is in Petitioner's argument before the trial Court on Respondent's motion for a verdict. (Tr. 111) Respondent therefore claims that no issue has been raised on this point because of the failure to introduce any evidence regarding the safety of the place of work.

Furthermore, it is a matter of common knowledge that the duty of a sectionman is to maintain the right of way and roadbed. It is also a matter of common knowledge that the roadbed is found upon solid ground in some places and has to be carried over highways and streams in other places. The duty of a sectionman is to maintain the right of way and roadbed wherever he finds them, whether upon solid ground or upon structures.

No employment is free from danger, nor is there any guarantee that the place of work on railroad right of way will be absolutely safe.

Missouri Pacific Co. v. *Aeby*, 275 U. S. 426;
Toledo, St. Louis, etc. Co. v. *Allen*, 276 U. S. 165.

Furthermore, this Court has properly given to railroad engineers considerable latitude for the exercise of their scientific judgment in the construction of railroad facilities. This Court said in *Delaware, etc. R. R.* v. *Koske*, 279 U. S. 7 at page 11:

> "Defendant was not bound to maintain its yard in the best or safest condition; it had much freedom in the selection of methods to drain its yard and in the choice

> of facilities and places for the use of its employees. Courts will not prescribe standards in respect of such matters or leave engineering questions such as are involved in the construction and maintenance of railroad yards and drainage systems therein to the uncertain and varying judgment of juries."

There is nothing in this Record to show that this bridge is of any other than standard construction upon which sectionmen work every day of their lives. As the Supreme Court of Vermont noted (R. 5, folio 6) cinders had been dumped at this place on many prior occasions by this same method without accident. Certainly these frog wrenches had been used to open cinder cars safely from time immemorial, (Tr. 80, 138), and no one had ever been hurt in so doing. (Tr. 136, 138)

It must be admitted, therefore, that the place where decedent undertook this work was not unsafe per se. If it was unsafe at all, it must be only because this particular decedent undertook the work there. The evidence shows conclusively that the place where this decedent stood was not "furnished" to this decedent by Respondent. The custom heretofore spoken of, (Tr. 73) constitutes a rule for the protection of employees like decedent. Decedent therefore placed himself in a position of peril, if indeed it was that, in violation of a safety rule made for his protection.

This Court has spoken with clarity of the legal position of an employe who is injured while engaged in activities forbidden by safety rules. In *Unadilla Valley Ry.* vs. *Caldine*, 278 U. S. 139, the Court said at page 142:

> "He, (plaintiff) cannot hold the company liable for a disaster that followed disobedience of a rule intended to prevent it when the disobedience was brought about and intended to be brought about by his own acts."

In the case at bar, this particular operation had been safely performed at this particular place many times before

(Tr. 41-42). The Record therefore affirmatively contradicts the charge that the place itself was unsafe. It follows that the Petitioner's claim must be narrowed to the safety of the place of work for this particular employee.

Because of the company rule (Tr. 73) which forbade Petitioner's decedent to work in this place, no claim can be based upon results flowing from a disobedience of that rule. Not only was this place of work not furnished to decedent, but the custom of work prevented his presence there. If the decedent chose to disregard company measures taken for his protection, the Petitioner cannot complain of injuries following such violations.

It is submitted that the Record fails to sustain the charge that this place was unsafe or that it was furnished as a place of work for this decedent.

2.

The Alleged Failure to Supply the Decedent With Proper Tools.

We agree with your Petitioner that the employer has a duty to furnish his employee with reasonably safe tools and appliances and that this duty does not require that the tools furnished shall be of the latest, best or safest quality. If the tools are reasonably safe and adequate, the employer's duty has been fulfilled.

Before discussing the adequacy of the frog wrench, may we respectfully call the Court's attention to the charge that the frog wrench was "furnished" to this decedent. The evidence was uncontradicted that there was no one on the job that day who had any authority to give instructions to the decedent. The decedent's Boss was Morello (Tr. 61) who was absent that day (Tr. 63). Section Foreman Stone, who assisted decedent, was not Bailey's boss and had no authority over him (Tr. 33, 38). Stone did not order dece-

dent to get the wrench nor to open the hopper car (Tr. 58). In fact, Stone did not know who decedent was and had never seen him before (Tr. 33). Sectionman Muir, from whom decedent demanded the frog wrench (Tr. 96), was not decedent's boss and had no authority over him (Tr. 99). Decedent did not explain to Muir why he wanted the wrench nor did Muir ask the decedent to take the wrench or order him to do so (Tr. 99).

It appears that another type of wrench was available to sectionmen, which was called a Swaco Safety wrench (Tr. 86) and the claim is that this is the wrench which should have been used (Tr. 132). The claim is that the employer furnished the frog wrench instead of this Swaco ratchet wrench, and thereby was negligent.

The Record does not show whether among the tools available on that day was a Swaco ratchet wrench. All we know is that this type of wrench had been procured and assigned to the use of the sectionmen. For all that appears, the Swaco wrench may have been with the other tools when the decedent made his choice of the instrument that he did. That being so, no claim can be made that improper tools were furnished. The employer made available to sectionmen both types of wrenches. If decedent deliberately ignored the ratchet wrench and selected the frog wrench, Petitioner cannot claim that the employer failed to make available the proper tool for this work. The burden of proof is upon the Petitioner. There is no proof which will sustain the argument that an improper tool was furnished, in a legal sense.

But assuming that this Court finds there is evidence that no such ratchet wrench was made available to the decedent, may we respectfully call the attention of the Court to the complete adequacy of the frog wrench. The frog wrench was standard equipment among sectionmen (Tr. 73, 78-79,

133, 136-137). It had been in common use on the Section for many years (Tr. 39, 42, 70, 57, 78-79, 133, 136-137). It had been used for years to open the hoppers of these cars (Tr. 80, 138). It had been completely satisfactory for all purposes (Tr. 39, 80, 138). A one-armed man could open these hopper cars with this wrench (Tr. 136). One Section Foreman who had worked on the Section for twenty-four years testified he had never known of any one getting hurt while opening a hopper car with one of these wrenches (Tr. 136, 138). Another sectionman who had worked on the Section for thirteen years testified he had never heard of any one getting hurt while opening a hopper car with one of these wrenches (Tr. 75). Another Sectionman who had been in the service for thirteen years testified the same thing (Tr. 60). A Section Foreman who had worked on the Section for twenty-one years testified to the same thing (Tr. 39). This long history of safety in the use of this frog wrench by Sectionmen to perform this work is a sufficient answer to the charge of furnishing adequate tools for this work. Admitting, as the Petitioner does, that the employer need not furnish the latest and most improved tools, it is submitted that this frog wrench was entirely adequate for the purposes intended by the decedent.

The argument is made that the Swaco ratchet wrench was more appropriate and safer than the frog wrench. The evidence denies this without contradiction. The word "safety" which appears in the manufacturer's name for the ratchet wrench, is a mere trade name, as counsel freely admitted at the trial. Counsel was asked if he claimed anything for the word "safety" when the Swaco Safety wrench was offered and he said that he did not (Tr. 122). Counsel for Petitioner was asked later by the Court as follows:

> "Mr. Lawson, do you expect to prove that this (Swaco) wrench is a much safer wrench than the

> other? You just offer the wrench, or do you offer a line of proof in connection with it (Tr. 124)?

to which counsel for the Petitioner answered:

> "Well, if the Court please, I doubt that under all the circumstances with which the plaintiff is faced that we can show the actual use of this wrench, this particular wrench. I have no way of determining who has used it" (Tr. 124).

Subsequently the Court said to counsel for the Petitioner:

> "You just offer the tool (Swaco wrench) that is all?"

to which Petitioner's counsel replied:

> "That is all, with our claim as I stated" (Tr. 124).

It will thus be seen by this admission of Petitioner's counsel that the Swaco ratchet wrench is not safer nor is any claim made about this. Counsel frankly admitted his inability to prove that the wrench which he claimed should have been furnished was in fact any safer than the wrench which was used. Counsel's admission in that regard is fortified by the testimony of a sectionman who had used both types of wrenches that the use of the ratchet wrench produces certain dangers which have to be carefully guarded against (Tr. 60).

It is therefore respectfully submitted that not only is there nothing in this Record to show that the ratchet wrench was any safer than the frog wrench, but that the Record affirmatively shows, and Counsel admits, that petitioner cannot prove the superiority of the one over the other. In these circumstances, obviously the Petitioner, upon whom the burden of proof rests, has failed to make a case.

3.

The Alleged Failure to Instruct the Employee Concerning the Use of the Frog Wrench.

We are dealing here with an ordinary type of wrench similar to other wrenches in common use by people in all walks of life, with the exception that this wrench is longer than is ordinarily used by such people. The length of this wrench is not formidable to a Sectionman who has been using such an instrument every day of his work. There is nothing intricate or technical in its construction. The law is well settled that no instruction on the use of simple tools is required. The case at bar is completely identical with *Ristucci* v. *Norfolk & W. Ry. Co.*, 60 F. (2) 28, where a recovery was denied by the Circuit Court of Appeals in precisely the same circumstances as comprise the instant case. The Court there held that under the Federal Act there was no duty to instruct an employee in the use of simple tools. But even if a duty to instruct could be interpolated into this case, we claim that the decedent had had sufficient instruction. He had watched these hopper cars being opened by the use of the frog wrench on many occasions (Tr. 67, 69, 74). When decedent demanded the frog wrench from Muir and walked out onto the bridge to open this car, Section Foreman Stone stood beside him and watched the decedent's preparation for this work (Tr. 34, 47). Stone, who had no authority over decedent, and did not know what his experience was (Tr. 33, 38), was impressed with the expertness with which decedent went about his work (Tr. 48). Stone, himself, was an expert at this work and was in a position to see whether or not decedent needed any instruction. Stone testified that decedent needed no instruction since he was thoroughly familiar with the manner in which this work should be done (Tr. 47-49). However, Stone

did caution the decedent notwithstanding the ability which the latter showed (Tr. 35), and decedent acknowledged the warning (Tr. 40).

It thus appears that the charge of failure to instruct is unwarranted. When men act at their work in such an expert manner as was the case here, obviously the employer need not give detailed instruction on the use of simple tools which are being handled in such a workmanlike manner. This Respondent had no notice of any kind of any defective education on the part of decedent to perform this work. Decedent's actions to a trained observer would indicate the utmost familiarity with the job at hand.

It is therefore respectfully submitted that the charge of failure to instruct cannot be sustained.

4.

The Legal Effect of Decedent's Own Negligence.

It is admitted that under the Federal Employers' Liability Act, contributory negligence is not a bar to recovery but goes only to diminish the damages. However, this Court has frequently held that there are cases where the negligence of the Plaintiff will defeat recovery completely, even though there may be some negligence by the defendant present. In instances where this Court has denied recoveries in cases of contributory negligence, it has been because the plaintiff's own negligence was active and proximate, while the negligence of the defendant was passive and non-operative.

The proposition is well stated in *L. & N. R. R.* v. *Davis*, 75 F. (2) 849 at page 851:

> "It has long been settled in this Court, following Great Northern Ry. Co. *v.* Wiles, 240 U. S. 444, 36 S. Ct. 406, 60 L. Ed. 732, that even in the presence of the defendant's negligence, plaintiff's own conduct may be such as to become the sole proximate cause of the injury" (Citing cases).

In the Great Northern case cited above, the Supreme Court began a long line of decisions to that same effect. The Court there found that both parties were negligent, but that the negligence of the plaintiff was the cause of the injury. In these circumstances, the Court said at page 448:

> "There is no justification for a comparison of negligence or an apportionment of their effect."

This case was followed in the same Court by *Frese* v. *C. B. & Q. R. R.*, 263 U. S. 1, where the Court said at page 3:

> "Whatever may have been the practice, he (the plaintiff) cannot escape his duty, and it would be a perversion of the Employers' Liability Act * * * to hold that he could recover for an injury proximately due to his failure to act as required, on the ground that possibly the injury might have been prevented if his subordinate had done more."

Again, in *Davis* v. *Kennedy*, 266 U. S. 147, the Court said at page 148:

> "It seems to us a perversion of the statute to allow his (plaintiff's) representative to recover for an injury directly due to his failure to act as required on the ground that possibly it might have been prevented if those in secondary relation to the movement had done more."

Again, in *Unadilla Valley Ry.* v. *Caldine*, 278 U. S. 139, the Court said at pages 141-142:

> "In our opinion he (plaintiff) cannot be heard to say that his subordinate ought not to have done what he ordered. He cannot hold the company liable for a disaster that followed disobedience of a rule intended to prevent it, when the disobedience was brought about and intended to be brought about by his own acts."

The Circuit Courts of Appeal have recognized the compelling force of this rule and have universally applied it.

L. & N. R. R. v. *Davis* (*supra*).
Pierre Marquette v. *Haskins*, 62 F. (2) 806.
Southern Ry. v. *Hylton*, 37 F. (2) 843.

Applying the above rules to the case at bar, we find that the Respondent's negligence, if any, was of a passive character. It created a mere condition. It was non-operative in a legal sense at the time the decedent attempted to open the hopper car. The decedent's participation, on the other hand, was active right up to the moment of injury. If he had the improper tool, as the Petitioner contends, if he went without orders to a place of danger, as the Petitioner contends, if he attempted to open the hopper car without previous instruction how to do so, as the Petitioner contends, that line of conduct was a conscious negligent act by him and the proximate cause of the result.

We do not contend that this is assumption of risk because we recognize the legal effect of this Court's decision in *Tiller* v. *Atlantic, etc. R. R.*, No. 296, October Term, 1942. Assumption of risk does not depend upon negligence but depends upon the maxim *volenti non fit injuria*. The argument advanced here is that this conduct by the decedent was negligent and that it was the sole proximate cause of the result, in spite of the alleged presence of passive negligence on the part of the defendant.

It is therefore respectfully submitted that in these circumstances:

> "There is no justification for a comparison of negligence or the apportioning of their effect." G. N. Ry. v. Wiles, 240 U. S. 444.

5.

The Alleged Negligence of the Respondent Is Not Related to the Accident.

It is well established in this Court that actions under the Federal Employers Liability Act must fail unless the plaintiff can prove that the accident resulted at least in part from the negligence of the defendant. It is admitted that the burden is upon the plaintiff to prove negligence and causal connection. In *Atchison, etc. Ry.* v. *Saxon*, 284 U. S. 458, this Court said at page 459:

> "As often pointed out, one who claims under the Federal Act must in some adequate way establish negligence and causal connection between this (accident) and the injury."

It therefore results that where an accident may have happened from one of several causes, for some of which the Defendant is liable and for some of which it is not, and the evidence does not show clearly which cause produced the result, there can be no recovery. The reason behind this rule is that in such event, the Plaintiff has failed to prove the causal connection between the alleged negligence and the result. The United States Supreme Court many years ago was confronted with this situation in *Patton* v. *Texas, etc. R. R.*, 179 U. S. 658, and said at page 663:

> "The fact of the accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employee to establish that the employer has been guilty of negligence * * *. It is not sufficient for the employee that the employer may have been guilty of negligence,—the evidence must point to the fact that he was. Where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have

> brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause when there is no satisfactory foundation in the testimony for that conclusion. If the employee is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony, and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs."

Again, in *New York Central R. R. Co.* v. *Ambrose*, 280 U. S. 486, the Court had under consideration a similar situation under this same Act, and said, at page 490:

> "The utmost that can be said is, that the accident may have resulted from any one of several causes, for some of which the company was responsible and for some of which it was not. This is not enough."

Again, in *Atchison, etc. R. R.* v. *Toops*, 281 U. S. 351, the Court said at pages 354-355:

> "But proof of negligence alone does not entitle the plaintiff to recover under the Federal Employers Liability Act. The negligence complained of must be the cause of the injury. The jury will not be permitted to speculate as to its cause and the case must be withdrawn from its consideration unless there is evidence from which the inference may reasonably be drawn that the injury suffered was caused by the negligent act of the employer."

There were only two men in a position to see what happened. One was Sectionman Lashua and the other was Section Foreman Stone. Lashua was not asked the question of what caused decedent to fall from the bridge and consequently gave no information (Tr. 22). Section Fore-

man Stone stood beside decedent when he fell (Tr. 37). Stone first said that he did not know whether decedent had his hands on the wrench or not when he fell (Tr. 37). Then Stone said that decedent must have had the wrench in his hands but "whether the wrench was what threw him over, I couldn't say, because I was watching the nut on the car"(Tr. 38). Stone further said "I couldn't tell what made him (decedent) go off the bridge" (Tr. 38).

It appears therefore from the Record that there is not the slightest evidence to connect any alleged negligence of this defendant with the result. The decedent may have slipped, he may have lost his balance, he may have had a dizzy attack. The Record is silent, and the Petitioner has failed to prove the causal connection between the alleged negligence and the accident, as the decisions of this Court require.

6.

It is therefore respectfully submitted that, viewing the evidence as a whole and in the light most favorable to the Petitioner, the proof fails to sustain the cause of action. It is therefore further submitted that the decision of the Supreme Court of Vermont is correct and should be affirmed.

Dated this 29th day of March, 1943.

Respectfully submitted,

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St. Albans, Vermont,
Counsel for the Respondent.

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SUPREME COURT OF THE UNITED STATES.

No. 640.—October Term, 1942.

Florence J. Bailey, as Administratrix of Bernard E. Bailey, Petitioner, *vs.* Central Vermont Railway, Inc. } On Writ of Certiorari to the Supreme Court of the State of Vermont.

[May 24, 1943.]

Mr. Justice Douglas delivered the opinion of the Court.

This action was brought under the Federal Employers Liability Act (45 U. S. C. § 51) in the state courts of Vermont to recover damages for the death of Bernard E. Bailey, one of respondent's employees. At the close of all the evidence respondent moved for a directed verdict. The Court denied the motion and submitted the case to the jury which returned a verdict for petitioner. On appeal the Supreme Court of Vermont reversed, by a divided vote, holding that the motion for a directed verdict should have been granted because negligence was not shown. — Vt. —. The case is here on certiorari.

Bailey had worked for respondent as a sectionman for about five years. On the day in question—May 14, 1940—he went to work on a work train to a point on the road in Williston, Vt., where he and other members of the crew unloaded track material to be used on the roadbed. Instructions were then received to unload a car filled with cinders. The evidence of the accident viewed in a light favorable to petitioner was as follows:

The car was pulled onto a bridge over a cattle pass so that the cinders could be dumped through the ties in the bridge floor onto the roadway below. The floor of the bridge was about 18 feet above the ground. The only available footing at the side of the car was about 12 inches wide. Of this space 8 or 9 inches were taken up by a raised stringer, i. e. a timber which lay across the ties and was set in 3 or 4 inches from their ends. There was no guard rail. The cinders to be unloaded were in a hopper car. That type of car has doors in the floor which are closed by a chain which winds up on a shaft running crossways of the car. The doors are opened from the side by one man turning a nut on the

end of the shaft while another disengages from a ratchet a dog which holds the shaft. A wrench is applied to the nut at the end of the shaft, the operator pulls its handle back to relieve the tension on the dog, the other person releases the dog, the operator of the wrench pushes back on it to open the hopper, the weight of the material in the car opens the doors. When the hopper starts to open, the shaft spins, and the operator must disengage the wrench or let go of it, lest he be thrown off balance or knocked down. The wrench used by Bailey was a heavy frog wrench—open jaws and a handle about three feet long. It had been used for many years for that purpose and no one had been injured by it. Bailey certainly was unskilled and perhaps unfamiliar in the opening of hopper cars. No one had ever seen him open one. Such an operation was usually performed by men older in point of service. Bailey had been present on a few occasions when hopper cars were unloaded but usually he was on top of the car at the time. Cinders were dumped at this bridge about once a year. As Bailey walked out on the stringer on the bridge and put the wrench on the nut, the section foreman said, "Be careful the wrench doesn't catch you." Bailey at once pushed on the wrench but the hopper did not open; he gave another push on the wrench, the hopper opened, the nut spun, and Bailey was thrown by the wrench into the roadway below. The hopper car could have been opened before it was moved onto the bridge and any cinders which spilled on the roadbed shoveled onto the roadway beneath the bridge. Or after the cinders had been dumped upon the roadbed a railroad tie could have been utilized as a drag to push cinders from the roadbed to the ground below the bridge.

Bailey died from the injuries resulting from the fall.

There was in our view sufficient evidence to go to the jury on the question whether, as alleged in the complaint, respondent was negligent in failing to use reasonable care in furnishing Bailey with a safe place to do the work.

Sec. 1 of the Act makes the carrier liable in damages for any injury or death "resulting in whole or in part from the negligence" of any of its "officers, agents, or employees". The rights which the Act creates are federal rights protected by federal rather than local rules of law. *Second Employers' Liability Cases*, 223 U. S. 1; *Seaboard Air Line Ry.* v. *Horton*, 233 U. S. 492; *Chesapeake & Ohio Ry. Co.* v. *Kuhn*, 284 U. S. 44. And those federal rules have been largely fashioned from the common

law (*Seaboard Air Line Ry.* v. *Horton, supra*) except as Congress has written into the Act different standards. *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. —. At common law the duty of the employer to use reasonable care in furnishing his employees with a safe place to work was plain. 3 Labatt, Master & Servant (2d ed.) § 917. That rule is deeply engrained in federal jurisprudence. *Patton* v. *Texas & P. Ry. Co.*, 179 U. S. 658, 664, and cases cited; *Kreigh* v. *Westinghouse, C. K. & Co.*, 214 U. S. 249, 256, 257; *Kenmont Coal Co.* v. *Patton*, 268 Fed. 334, 336. As stated by this Court in the *Patton* case it is a duty which becomes "more imperative" as the risk increases. "Reasonable care becomes then a demand of higher supremacy, and yet in all cases it is a question of the reasonableness of the care—reasonableness depending upon the danger attending the place or the machinery." 179 U. S. p. 664. It is that rule which obtains under the Employers Liability Act. See *Coal & Coke Ry. Co.* v. *Deal*, 231 Fed. 604; *Northwestern Pac. R. Co.* v. *Fiedler*, 52 F. 2d 400; *Thompson* v. *Boles*, 123 F. 2d 487; 2 Roberts, Federal Liabilities of Carriers (2d ed.) § 807. That duty of the carrier is a "continuing one" (*Kreigh* v. *Westinghouse & Co., supra*, p. 256) from which the carrier is not relieved by the fact that the employee's work at the place in question is fleeting or infrequent.

The nature of the task which Bailey undertook, the hazards which it entailed, the effort which it required, the kind of footing he had, the space in which he could stand, the absence of a guard rail, the height of the bridge above the ground, the fact that the car could have been opened or unloaded near the bridge on level ground—all these were facts and circumstances for the jury to weigh and appraise in determining whether respondent in furnishing Bailey with that particular place in which to perform the task was negligent. The debatable quality of that issue, the fact that fair-minded men might reach different conclusions, emphasize the appropriateness of leaving the question to the jury. The jury is the tribunal under our legal system to decide that type of issue (*Tiller* v. *Atlantic Coast Line R. Co., supra*) as well as issues involving controverted evidence. *Jones* v. *East Tennessee, V. & G. R. Co.*, 128 U. S. 443, 445; *Washington & G. R. Co.* v. *McDade*, 135 U. S. 554, 572. To withdraw such a question from the jury is to usurp its functions.

The right to trial by jury is "a basic and fundamental feature of our system of federal jurisprudence." *Jacob* v. *New York*

City, 315 U. S. 752. It is part and parcel of the remedy afforded railroad workers under the Employers Liability Act. Reasonable care and cause and effect are as elusive here as in other fields. But the jury has been chosen as the appropriate tribunal to apply those standards to the facts of these personal injuries. That method of determining the liability of the carriers and of placing on them the cost of these industrial accidents may be crude, archaic, and expensive as compared with the more modern systems of workmen's compensation. But however inefficient and backward it may be, it is the system which Congress has provided. To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them.

Since the evidence of respondent's negligence in failing to provide Bailey with a safe place to work is sufficient to support the verdict of the jury and the judgment of the trial court, we do not reach the other issues which have been presented by petitioner.

Reversed.

SUPREME COURT OF THE UNITED STATES.

No. 640.—October Term, 1942.

Florence J. Bailey, as Administratrix of E. Bailey, Petitioner, vs. Central Vermont Railway, Inc. } On Writ of Certiorari to the Supreme Court of the State of Vermont.

[May 24, 1943.]

Mr. Justice Roberts.

I am of opinion that this case is one of a type not intended by Congress to be brought to this court for review. Actions under the Federal Employers Liability Act constitute but one category of the great total of actions triable in Federal District Courts and in the courts of the forty-eight states which may come to this court. While the legal principles binding alike on court and jury in such actions are, for the most part, settled, the complexes of fact to which these principles are applicable rarely are identical in any two litigations. If, in every case where, peradventure, this court might differ from a lower court in appraising the legal effect of the proofs adduced by plaintiff or defendant, we independently review the facts to determine whether there was evidence for a jury's consideration, we shall reverse a course founded in over fifty years of history.

While a litigant has no constitutional right of appellate review, Congress has seen fit to grant it. And, until 1891, this court was, with negligible exceptions, the only instrument of such review. The increasing volume of our appellate work bade fair to render the court incompetent to give needed consideration to important cases which the public interest required that it decide. To preserve the privilege of appellate review, and to provide an appellate tribunal where most federal litigation should end without resort of this court, Congress created the Circuit Courts of Appeals.[1] The relief thus afforded this court prevented the substantial breakdown of our appellate function. But the relief proved insufficient, and Congress continued to adopt means to render it possible for

[1] Act of March 3, 1891, 26 Stat. 826.

us to do the indispensable work of the court. In 1915 it made the judgments of Circuit Courts of Appeals final in certain classes of cases arising in Puerto Rico and Hawaii, and also in bankruptcy cases, subject, as to the latter, to our discretionary power to take cases involving important questions.[2] The House Committee in its report said as to the objects of the bill:[3]

"Relieving the Supreme Court of the United States from the necessity of reviewing such cases from the Supreme Courts of Porto Rico and Hawaii as involve no Federal question, but depend entirely upon the local or general law. Under the law as it now stands the decisions of the Supreme Courts of Porto Rico and Hawaii are reviewable by the Supreme Court of the United States not only when some Federal right is in controversy, but also in all cases which involve more than $5,000. without respect to the character of the questions involved. This section as amended includes Porto Rico with Hawaii and continues the existing right to review in the Supreme Court when Federal rights are in controversy, but leaves all other cases to be dealt with upon a petition for a writ of certiorari, as is now the law with respect to most of the cases in the circuit court of appeals."

The great mass of litigation in state and federal courts arising under the Employers Liability Act and railway safety appliance legislation still could be brought to this court as of right under existing law.[4] In 1916 Congress abolished the right and made the judgments of state appellate courts and Circuit Courts of Appeals final in this class of cases, subject to our discretionary review.[5] The Senate Committee report on the bill was entitled "Relief of the Supreme Court", and to it was appended a memorandum prepared by the clerk of this court exhibiting the congested state of our docket.[6] Finally, in 1925, Congress dealt in the same fashion with all litigation sought to be brought here for review from state and federal tribunals, save for certain narrowly restricted classes.[7]

Without the benefit of this restriction of its obligatory jurisdiction this court could not have attained the end and aim of its creation. But there remains the constant danger that, by taking

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[2] Act of January 28, 1915, 38 Stat. 803.

[3] H. R. No. 847, 63d Cong., 3d Sess.

[4] Southern Ry. Co. v. Crockett, 234 U. S. 725.

[5] Act of Sept. 6, 1916, c. 448, 39 Stat. 726, § 3. See Andrews v. Virginian Ry. Co., 248 U. S. 272.

[6] S. R. No. 775, 64th Cong., 1st Sess. See also the House Report No. 794, 64th Cong., 1st Sess.

[7] Act of February 13, 1925, 43 Stat. 936.

cases lying outside defined areas of importance, the court will limit its ability adequately to deal with those which all will agree it must adjudicate.

And so the policy of the court has been to abstain from taking a case even though it thought it erroneously decided below, whether on an issue of law or fact, if the decision did not involve an important question of law, did not create a diversity of decision in lower courts, or would not seriously affect the administration of the law in other cases. And this has been especially so where a decision below recognized the controlling legal principles but was claimed to have applied them improperly to the specific facts disclosed. The instant case plainly belongs in the class last mentioned. All members of the Supreme Court of Vermont agreed upon the controlling legal rule. They sharply and almost evenly divided on the question whether the plaintiff's evidence brought her case within that rule. What they decided, and what we decide, can add nothing to the body of jurisprudence. And it is irrelevant to the question of our exercise of the power of review that if we had been charged with the responsibility of a trial judge or a member of the court below, we might have held the case one for submission to a jury.

In almost every litigation the parties are afforded hearings in at least two courts. This was true here, the appellate court being the supreme court of the state of the parties' residence. If, in such a case, we accord a third hearing, whenever we should have applied the law differently, we shall have little time or opportunity to do aught else than examine the claims of plaintiffs and defendants that, in the special circumstances disclosed, prejudicial errors have been committed in the admission of evidence, in rulings of law, and in charges to juries.

There is no reason why a preference should be given, in these respects, to actions instituted under the Federal Employers Liability Act, over others founded on other federal statutes, over contract cases, or admiralty cases, where a failure properly to rule on the facts is asserted to have wrought injury to one of the parties.[3]

It seems to be thought, however, that any ruling which takes a case from the jury, albeit it will not serve as a precedent, is of such paramount importance as to require review here. I merely state my conviction that the Seventh Amendment envisages trial

[3] See the dissent in Deputy v. Du Pont, 308 U. S. 488, 499.

not by jury, but by court and jury, according to the view of the common law, and that federal and state courts have not usurped power denied them by the fundamental law in directing verdicts where a party failed to adduce proof to support his contention, or in entering judgment notwithstanding a verdict for like reason. But this I do say, that this court does not sit to redress every apparent error committed by competent and responsible courts whose judgments we are empowered to review. And, if we undertake any such task, we shall disenable the court to fulfill its high office in the scheme of our government.

Finally, I cannot concur in the intimation, which I think the opinion gives, that, as Congress has seen fit not to enact a workmen's compensation law, this court will strain the law of negligence to accord compensation where the employer is without fault. I yield to none in my belief in the wisdom and equity of workmen's compensation laws, but I do not conceive it to be within our judicial function to write the policy which underlies compensation laws into acts of Congress when Congress has not chosen that policy but, instead, has adopted the common law doctrine of negligence.

Mr. Justice FRANKFURTER joins in this opinion.

Mr. Chief Justice STONE.

I agree with Mr. Justice ROBERTS that the present case is not an appropriate one for the exercise of our discretionary power to afford a second appellate review of the state court judgment by writ of certiorari. But as we have adhered to our long standing practice of granting certiorari upon the affirmative vote of four Justices, the case is properly here for decision and is, I think, correctly decided.